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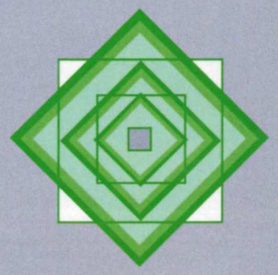
PHILOSOPHY OF LAW

An Introduction to Jurisprudence

Revised Edition



Dimensions of Philosophy Series

ROUTLEDGE

1

The Nature of Law

Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is The Law.

—W. H. Auden,
from "Law Like Love"

One of the oldest problems in the philosophy of law, and the problem with which most legal philosophy courses commonly begin, is the analysis of the concept of law itself. At the outset, this might strike the reader as puzzling. Why is this such a problem? Why does it matter? A chemistry course does not begin with a tortured discussion on "what is chemistry?" A history course does not usually begin with such a discussion of "what is history?" (given that we all know that history is just one damned thing after another), and so on for most other courses in a college or university catalog. What is there then about the concept of law that makes its analysis sufficiently difficult and important that it must precede all other issues in the philosophy of law?

This question is natural and sensible enough that it requires a careful answer. Probably the best general start toward an answer has been provided by the contemporary English legal philosopher H. L. A. Hart, who has noted certain features about law that make its analysis puzzling:[1]

(1) Law is clearly a device for *social control*—a device for getting people to do things they would be unlikely to do if left to personal inclination alone. But how does a *legal* method of social control differ from other methods of social control with which the legal may easily be confused—e.g., *morality* or mere *force?* There is so much overlap in the language of morality and the language of the law (both talk of duty, rights, obligation, responsibility, etc.) that it would be easy to confuse the two. And yet, when

we reflect and realize that it is possible for certain laws (e.g., clearly some of those of Nazi Germany) to require conduct that is immoral, we realize that law and morality are in some sense different even if closely related. Is one difference between law and morality perhaps that the former is necessarily backed up by *force* or the *threat of force* and the latter is not?

Force is so obviously a large part of every legal system that some identification of law with force might be tempting. But further reflection again shows that such a simple identification would be misleading. Once we move from the domain of criminal law, it is difficult to support the claim that law must involve force. There may, for example, be force present in the laws detailing procedures for making a valid will, but its presence is certainly not obvious. Also, certain instances of force (e.g., a gunman putting a pistol to your head and demanding your money or your life) are clearly not legal in nature. Thus force, though perhaps intimately related to law, cannot be identified with law. What, then, are the relations between the concepts "force," "morality," and "law" if not relations of identity? The vividness of this question provides one reason why the concept of law requires analysis.

(2) The concept of law may be used ambiguously and may thus cause serious moral and intellectual confusion. Sometimes, when people speak of laws, they are speaking of *descriptive* laws—statements of how things, as a matter of fact, regularly do happen. The so-called "law of gravity" is an example of a descriptive law. Other times, when people speak of laws, they are clearly speaking of *prescriptive* laws—authoritative statements about what should or ought to happen or about what should or ought to be permitted to happen. The First Amendment to the United States Constitution ("Congress shall make no law respecting an establishment of religion . . .") is clearly a prescriptive law concerning the enactment of other prescriptive laws. It is not a statement of what Congress has in fact done or a prediction of what Congress will in fact do. It is rather a statement of what Congress, in enacting other prescriptive laws, is permitted and not permitted to do. These sorts of laws and legal systems, prescriptive laws and systems of prescriptive laws, are the object of study in the philosophy of law. Descriptive laws are examined in the philosophy of science.

As clear as the distinction between descriptive laws and prescriptive laws is, the two senses of "law" are still sometimes confused. Some people, for example, are inclined morally to condemn certain sexual practices (e.g., oral or anal copulation) as "contrary to the laws of nature" or simply "unnatural" in order to support their belief that these practices are evil and should be punished by the criminal law. But when they speak here of "contrary to natural law," what in the world can they possibly mean by this phrase? Surely they do not mean that such acts *cannot* happen, that such sexual acts are like acts of changing water into wine, contrary to descriptive laws of nature in the sense that their occurrence would be a *miracle.* Does "contrary to laws of nature" then mean "statistically infrequent"? If so, then the claim is clearly descriptive and one can draw no moral or other evaluative or

prescriptive conclusion from it. (Artistic creativity and genius are statistically infrequent. Does that make expression of these traits immoral?) If "contrary to nature" means "not in accord with dominant biological function," then gourmets (those who sometimes eat purely for pleasure) would seem to merit our moral condemnation—a very counterintuitive claim. Suppose then that these persons mean something prescriptive when they say "laws of nature." We might then well ask them what authority prescribes to nature; is there perhaps a cosmic legislature? If, as is most likely the case, these people really mean by "contrary to nature" something like "contrary to my religion's interpretation of God's commands," then they should simply say this, avoid all the confusing and ambiguous references to laws of nature, and face the resulting problems honestly and squarely—one of the problems in our system being the First Amendment's ban on an establishment of religion.

Not all linkings between descriptive and prescriptive law, however, are as confused as the one noted above. Consider the following problem: Would we say that a certain document—a written constitution perhaps—was really the prescriptive law of the land if nobody ever in fact obeyed it or paid it even the slightest bit of attention? Does not the claim that the United States Constitution is the highest prescriptive law of the land have something to do with the descriptive fact that this document is actually appealed to in deciding legal cases? If, starting tomorrow (because of a revolution perhaps), all citizens, legislators, government executives, and courts started ignoring the Constitution, would it still be the law of the land? At some point would we not be forced to say that it was at most *former* or *previous* law?

Legality is not to be simply identified with descriptive regularity any more than it is to be simply identified with morality or force. As these questions clearly show, however, it must have some important relationship with such regularity. An analysis of the concept of law will perhaps illuminate what this relationship is.

(3) The concept of law strikes up against certain puzzling but important *borderline cases*—cases of practices or institutions that have enough features in common with clear cases of law to tempt us to regard them as law but enough dissimilar features to tempt us in the other direction as well. Is *international law* really law? Is *primitive law* really law? Some writers who have been inclined to answer no have raised this challenging question: If these practices really are legal (rather than simply quasilegal or prelegal), then where are the legislative bodies to enact their laws, the courts to authoritatively interpret them, and sanctioning bodies to back them up with force? Let us suppose for a moment that these features are indeed absent. Until we first determine the relations of the concepts of legislation, court, and sanction to the concept of law itself, we shall not be in a position to know to what extent, if any, an absence of these features will pose a problem to the classification of international law and primitive law as genuine instances of law.

The point here is not to guarantee the removal of international law and primitive law from the class of borderline cases of law, because they may

genuinely be borderline cases. If so, their removal would be arbitrary conceptual legislation or stipulation and would simply achieve, not clarity, but what Hart has called "uniformity at the price of distortion." The point is really to understand precisely the nature of these cases—to determine, if they are borderline, exactly why they are borderline. Only an adequate analysis of the concept of law will allow us to do this.

(4) The final problem worth noting is the following: The concept of law, it will later be discovered, will require analysis in terms of elements that, in themselves, also raise interesting and important philosophical issues. At least some laws, for example, seem to involve, depend upon, or even be *rules*. But what is a rule and what does it mean to say of a rule that it *exists*? Rules are not material objects that can be seen, touched, and pointed to. We cannot hang our hats on them or eat our food off the top of them, and thus they clearly do not exist in the same way in which hatracks and tables exist. And yet there is some point in saying of some rules that they do exist, and of others that they do not. There *really is* a legal rule in our society prohibiting rape. And there *really is not* a legal rule in our society requiring attendance at church. But what does this talk of "exists" and "really is, really is not" actually come to with respect to such queer entities as laws and rules? We have here then a class of *existence* questions, and an adequate analysis of the concept of law will perhaps help us with these questions. We must know what law is, what kind of "thing" it is, before we shall be in a position to know what sense of "exists" applies to it.

We have now considered the main reasons that Hart gives in defense of his claim that the analysis of the concept of law is interesting, difficult, and necessary before proceeding to other questions in the philosophy of law. But in what sense, if any, is the analysis of the concept of law important? Hart's four reasons alone, of course, demonstrate that an inquiry into the concept of law is *philosophically* important. But is this inquiry important in some more "practical" sense—some sense that would commend it to those motivated by concerns other than philosophical curiosity?

I think that the answer to this question is yes, and I would cite two considerations in defense of this answer. First, it is instructive to see how central an understanding of law is to some very profound moral and political concerns. We are, for example, inclined to criticize and perhaps fight states (e.g., Nazi Germany) that depart substantially from our ideal of the "rule of law," and we often like to praise our own system by reciting, even if without full understanding, the venerable slogan that we live under "a government of laws and not of men." Indeed, most of us feel, whether reasonably or not, that we owe some kind of moral duty or allegiance to the law or to our own legal system, and we often call on ourselves and others to respect and obey the law of the land even when we or they do not wholeheartedly approve of what that law requires in a particular case. In short, for most of us the claim "because it is the law" carries some moral force—disobedience being regarded as morally serious (requiring moral justification) and not simply as unwise or imprudent.

We cannot, of course, even understand this claim of moral allegiance to law until we understand the concept of law itself, and, given that rational evaluation presupposes understanding, we cannot evaluate the claims for moral fidelity to law in the absence of such analysis. If, for example, law is simply to be identified with mere force, then it would be hard to mount a persuasive case for a moral obligation to obey the law. I may fear and understandably obey the thug holding a gun to my head, but the thug surely has no moral claim on my obedience. These considerations of moral fidelity and allegiance are surely provocative enough to demonstrate the importance of analyzing the concept of law even to those (their numbers are legion) who do not see philosophical clarity as a good for its own sake.

A second (and related) practical reason for being concerned with an analysis of the concept of law is more strictly *legal* in nature. When, in an everyday context, we seek to have "the law" applied to a controversy in which we are involved, what exactly are we seeking? Those who are naive about the nature of law are inclined to think that it is easy to discover the law that applies to any particular case: one just looks it up in a statute book or pays a lawyer to look it up. In reality, however, the process of discovering the law is often not so simple. Perhaps the statute is vague—e.g., it prohibits driving a vehicle while intoxicated and you, cited for being intoxicated while pedaling your bicycle, believe that the statute does not really cover your action (you believe that a bicycle is not a vehicle). When the court agrees with you and holds that a bicycle is not a vehicle for purposes of this statute,[2] even though in an earlier case it had held that a moped with its engine off is a vehicle,[3] what is actually going on? Is the court really applying a law to new cases or is it simply making it up as it goes along, legislating rather than judging?

If interpreting a simple statute can raise problems about the nature of law, imagine how these problems can be compounded in other more complex sorts of cases. Some cases are only loosely governed by statute or not governed by statute at all. In a common law system such as ours, applying "the law" to a particular case often means, not applying a statute, but rather a present judge applying to the present case the rulings (called "precedents") of previous judges in earlier cases. Since these earlier cases are rarely exactly like the present case, however, the judge will have to depend on analogies, a process that at least seems to leave a great deal of free play for the judge's discretion. Sometimes the decision, though defended by analogy with the past, will transform the law for the future, as when Justice Cardozo, for the first time, interpreted precedents so that automobile manufacturers could be held liable for injuries caused to the driving public by negligent manufacture of their product.[4] What does it mean to talk about "the law" here—was it something Cardozo discovered and applied or did he just invent it, using the talk about precedents simply as a rationalization? Or consider controversial constitutional cases—e.g., the Supreme Court finding that the right to privacy, though never mentioned in the Constitution, is a fundamental constitutional right and then holding that this right

encompasses the right of a woman to choose an abortion.[5] The more we consider cases such as these, the more puzzled we become. We started off thinking that, as practical persons, we need only be concerned with *the* law—i.e., with the particular laws that apply to our daily lives. When the issues become even remotely complex, however, we soon discover that *the* law is not so easily determined, and we might at this point begin to find our slogan "a government of laws and not of men" less and less clear. Unless we want simply to adopt the cynical view that the whole legal process is nothing more than a con game, we shall want to distinguish, even in those cases of unpredictable outcome where great discretion seems to be allowed, a judge's being guided by consideration of factors that are clearly nonlegal (e.g., bribes, coin flips, etc.) in contrast to being guided by considerations that, however vague and imprecise they may be, have a proper place in the legal process. But how could we possibly draw this distinction without an examination of the concept of law itself, without an inquiry into the question of what makes a process a legal process in the first place?

Having defended the enterprise of analyzing the concept of law, we are now in a position to begin the enterprise itself in earnest. We shall examine the question "What is law?" and shall start our examination with a consideration of some of the main theories that have been put forth as answers to this question.

Natural Law Theory

Natural law theories maintain that there is an essential (conceptual, logical, necessary) connection between law and morality. The demands of law and the demands of morality do not just happen to overlap sometimes as a matter of fact; their overlap is not just a contingent matter for empirical discovery. Rather, according to natural law theory, it is part of the very meaning of "law" that it passes a moral test. This does not necessarily mean that there is an equivalence between law and morality, because some natural law theorists are willing to admit that there are many moral obligations that have no place as legal requirements (e.g., private obligations of courtesy and gratitude) and that many legal requirements do not, in content, represent moral obligations (e.g., a legal requirement that certain documents be submitted in triplicate for administrative convenience). What is a necessary truth, however, is that no rule can count as a law unless what it requires is at least morally *permissible*—hence St. Augustine's famous natural law slogan that "an unjust law is no law at all." In short: Moral validity is a logically necessary condition for legal validity. Satisfying certain demands of morality is part of the very *definition* of "law," and therefore the connection between "law" and "morality" is more like the connection between "puppy" and "young" rather than the connection between "puppy" and "difficult to toilet train."

Given what we have already noted in the Introduction concerning the dangers of confusing law and morality, it might seem that what has here

been identified as "natural law theory" is too implausible to merit serious study as a philosophical theory on the nature of law. There is perhaps a sense in which this suspicion may be justified, at least for the earliest and simplest versions of the theory. However, because the motivations of the theory were important and because it was groping, however confusedly, toward some genuinely profound insights and because it has been and continues to be influential in some circles, natural law theory merits study in an introduction to legal philosophy. The historical origins of the natural law tradition are very ancient, and this section will examine the traditional or "classical" version of the theory. In a later section of the chapter we shall explore certain contemporary attempts to reformulate natural law theory or to save some of its essential insights from the attacks to which it has been subjected by proponents of other legal theories. Even though some hard and unsympathetic things will be said about natural law theory in this section, the reader should suspend judgment about the ultimate merits of the theory until reading the much more sympathetic later section.

Classical natural law theory was originally developed by such ancient writers as Plato, Aristotle, and Cicero and attained its most systematic statement in the medieval Christian philosophy of St. Thomas Aquinas.[6] Though the claim that there is an essential connection between law and morality will strike many modern readers as counterintuitive, the theory represented a distinct advance in the history of thought for it grew directly out of the development of a *moral* outlook on social and legal arrangements. Traditionally, people had simply obeyed the law out of custom, habit, or fear of force—the role of the latter being so great that there was even some tendency to identify the law with force. Increasingly, however, reflective people (e.g., Socrates) insisted on raising the question: Why morally *ought* one obey the law?[7] It cannot be morally right to obey the law merely because it is customary to obey it, since obviously customs can be irrational and evil. Just because something is usually done it does not follow that it ought to be done. Similarly with force: The threat of force can certainly provide one with motives (e.g., fear), but this can hardly establish the law's rational claim on our allegiance. Before this can be established, we should first need to present morally sufficient reasons for legal obedience. Thus, the questions: How should a morally serious and reflective person consider the law? When is such a person morally obligated to obey the law?

Now there is one rather simple answer that one might be tempted to give to this question, and the answer forms an essential part of the classical natural law theory. This is: One is obligated to obey the law only if the *content* of the law is itself moral. Should I obey the law against murder?—yes, because murder is wrong in itself (*malum in se*). Should I obey the law requiring that certain forms be filed in triplicate even though contrary filing is not wrong in itself but only wrong because prohibited (*malum prohibitum*)?—yes, if most of the laws under which I live serve moral purposes, because it is reasonable that the law aims at administrative convenience in its efforts to do good and because what is required of me in this case is not morally

wrong. Should I obey a law requiring that I kill innocent persons in time of war?—no, because this law is unjust and thus no law at all. If the legal order is viewed as essentially connected with the moral order, then there will be moral reasons justifying allegiance to law and moral reasons justifying disobeying fraudulent imitations of law, and the grounds for legal obedience and disobedience will transcend appeals to mere custom or force.

It seems as though a title such as "moral law theory" would capture the nature of the account thus far given, and so one might wonder why such theories are typically referred to as "natural law" theories. Where, one might well ask, is the notion of "nature" or "natural" that gives these theories their title? The answer to this question is this: Initially, natural law theories involved more than the simple claim that the legal order was to be understood as essentially connected with the moral order; also involved was a certain claim about the *nature of the moral order itself.* On this view, the moral order (or at least that part of it not dependent on divine revelation) was viewed as a part of the order of nature. Nature had fixed a set of ends or purposes (an essence) for human beings in the natural order of things. (In the Christian view, God had implanted these essential purposes in nature.) Moral duty consisted in acting in accord with these purposes, and we thus were supposed to discover the essential purposes of creatures such as ourselves. The virtuous human life consisted in living consistently with our natural (perhaps God-designed) function, and systems of social coercion were properly called "legal" only if consistent with such functions.[8]

To view nature and the place of humans in it in terms of ends, goals, or purposes is called a *teleological* worldview (from the Greek word *telos*, meaning "end" or "purpose"). We now, of course, live in the post-Darwinian world and are accustomed to viewing nature (even human nature) in terms of mechanistic causation, and thus we are generally inclined to view teleological worldviews as quaintly prescientific. The modern mind finds it difficult to accept that people have ends or purposes other than those they have set or accepted for themselves. Even if we grant the existence of cosmic purposes, however, any moral theory based on them would still be faced with serious problems. Suppose that I do have a purpose set by God or nature (whatever that might mean). By what logic does it follow that I am ethically required to act in accord with that purpose? It might be imprudent (if God is vengeful) to act contrary to the plans He placed in nature for me, but do I make any kind of *logical* blunder if I adopt the opinion that a moral person will often choose to act contrary to these dictates? If God commands that I sacrifice my eldest son, might I not say, without logical error, that I regard such a command as evil and will not obey it? And suppose that I come to believe that the natural (typical, biological) function of my mouth is to provide an opening for the attainment of nourishment; can this have any rational bearing on answering the question of whether I act permissibly if I choose to use my mouth for erotic or sensual purposes? Is becoming a gourmet "unnatural" and thus obviously evil? Surely not. Indeed, on one plausible view, the very best achievements of human beings

result when they learn in a sense to overcome nature (e.g., by being less violent than they are naturally inclined to be).[9]

This view may be incorrect, but it seems to involve no logical incoherence. Neither does there appear to be any logical incoherence in the view that the idea that human beings have a function, far from being the basis of morality, is actually a *degrading* view. Is our moral status simply to be a matter of our having functions or purposes in the way that hammers and other instruments do, or in the way that occupants of social roles (e.g., servants) do? And if it is, what happens to the notion of human dignity then? (How would you like it if someone said to you, "And what are you for?") Different people will answer such questions differently no doubt, but no one answer gets preferred logical status by having the label "natural" attached to it. To use the language of G. E. Moore, it is always an "open question" what morally ought to be done given any statement of what is naturally done or factually the case. To think otherwise is to commit what Moore called "the naturalistic fallacy"—the fallacy of believing that one can derive a theory of what *ought* to be the case from an account of what *is* the case.[10] Thus, because of what is (to put it mildly) a certain logical looseness in any account of natural duty, natural law ethical theory often appears arbitrary and confused—an attempt to explain the obscure (what we ought to do) in terms of the even more obscure (moral duties built into nature). When they do attempt to be clear, natural law theorists often offer clarity at the price of uselessness, as when Aquinas offers the following as the first principle of natural law theory: "Do good and avoid evil."[11] One can hardly quarrel with the sentiment expressed here, but one troubled with a moral problem is going to find this piece of highly general advice of very little use. For all these reasons, it is not surprising that natural law ethical theory has often provoked impatience and even contempt from its critics. For Aristotle and Aquinas, the natural law was viewed as a mechanism for imposing duties and giving guidance for the virtuous life. In the later and much more individualistic "natural rights" formulation developed during the Enlightenment and influential during the French and American Revolutions, the natural law was viewed as establishing certain moral entitlements (e.g., the right to freedom) that all human beings supposedly have simply by virtue of being human. In either form the doctrine is open, according to its critics, to the charge that it must be based either on the dogmatic acceptance of an implausible worldview or on the subjective deliverances of the private conscience of each individual—neither foundation having much to commend it to the rational person. Representative of such critics, Jeremy Bentham called the doctrine "nonsense on stilts" and the Danish legal philosopher Alf Ross wrote of it as follows:

> Like a harlot, natural law is at the disposal of everyone. The ideology does not exist that cannot be defended by an appeal to the law of nature. And, indeed, how can it be otherwise, since the ultimate basis for every natural right lies in a private direct insight, an evident contemplation, an intuition. Cannot my intuition be just as good as yours? Evidence as a criterion of truth explains the utterly arbitrary character of the metaphysical assertions. It raises them up above any force of intersubjective control and opens the door wide to unrestricted invention and dogmatics.[12]

To summarize: Classical natural law theory can be understood as a commitment to the following two claims: (1) Moral validity is a logically necessary condition for legal validity—an unjust or immoral law being no law at all; and (2) The moral order is a part of the natural order—moral duties being in some sense "read off" from essences or purposes fixed (perhaps by God) in nature.

At this point, it is important to note the following: Even if one rejects (2) utterly, one might still consistently subscribe to (1). That is, one might be a natural law theorist in holding that moral validity is a necessary condition for legal validity without subscribing to the particular theory of moral validity (consistency with natural purpose or end) typically conjoined with that view. This possibility forces one to confront the following question: Is an attempt to tie the concept of law to *any* concept of morality doomed to failure, or are the problems with classical natural law theory due solely to the controversial moral theory then adopted?

An examination of this question does not initially raise one's hopes for the viability of natural law theory even so limited or modified. Classical natural law theory typically tied law to a highly controversial moral theory; but, given even the most plausible theory possible about the nature of morality, it still seems initially reasonable to maintain that such a theory should be distinguished from a theory about the nature of law. Careful reflection certainly inclines the rational person to believe that law and morality are simply different and that failing to appreciate this difference is the root mistake and confusion in traditional natural law theory. Consider the definition of "law" offered by Aquinas:

> Law is nothing else than an ordinance of reason for the common good, promulgated by him who has the care of the community. . . . Human law has the nature of law in so far as it partakes of right reason. . . . So far as it deviates from reason, it is called an unjust law and has the nature, not of law, but of violence. . . . Such are acts of violence rather than laws because, as Augustine says, a law that is not just seems to be no law at all.[13]

What seems to be happening here is that the concept of *ideal* or *perfect* or *morally good* law is seen as part of the moral order; from this correct insight, a careless slide is made into identifying law itself with a part of morality—the ideality no longer being regarded as a possible and desirable feature of law but as a part of the very meaning of "law." The phrase "morally acceptable law" is redundant, and the phrase "morally evil law" is contradictory. When Aquinas speaks of "being in accord with reason" and "being for the common good," he seems to be making a comment, not merely (and sensibly) about desirable features of law, but rather as part of the analysis of the concept of law or legality—matters of definition rather

than evaluation. If this is the view, then it seems immediately open to some serious and rather obvious objections. There are many rules in any society that are surely laws but are just as surely morally neutral—e.g., some law requiring that one have one's validated registration tag on the auto license plate prior to March 1. Aquinas sensibly admits that such rules are laws, but the degree to which the admission is compatible with the literal wording of his definition is unclear. Such rules, though no doubt consistent with the common good, are not obviously *for* the common good in the sense that laws prohibiting murder are clearly for the common good. However, interpretive charity perhaps requires that we give Aquinas the benefit of the doubt on this one. What does seem noncontroversial and central about Aquinas's theory is that he is committed to the claim that an evil or unjust law is no law at all, that legal requirements must, as a matter of definition, require only conduct that is morally permissible.

A dramatic and decisive counterexample to this view, however, is the obvious existence of legal rules that clear thinking would force us to acknowledge as laws even if we believed them to be morally evil. Suppose, for example, that you believe that it is morally wrong for the state to eliminate all considerations of fault in granting legal divorces. Surely you could not reasonably conclude from this that all those persons in a "no-fault" state who claim to be legally divorced are really not divorced at all but are still legally married. You may think that these laws are unworthy of your respect (because they are, in your judgment, evil or irrational laws), but what is gained in saying that they are not laws at all? The sentence "That law is evil and unjust and I will not, on moral grounds, respect or obey it" does not seem incoherent, and the sentence "That law is just and so I morally admire it" does not seem redundant, as each would if the claims of classical natural law theory were taken literally.

At this point, one might well begin to wonder if classical natural law theory is really saying anything useful at all. Its great value historically was that it brought to light the need for moral criticism of law and got people thinking about obligation rather than force as of the essence of law. But when these insights were built into an attempted analysis or definition of the concept of law itself, the resulting confusions and incoherences became very great indeed. According to one critic, H. L. A. Hart, natural law theory is correct in its attempt to distinguish law from mere force by the use of the concept of obligation—a concept having no home in a world of mere force.[14] What the natural law theorist does not see, however, is that the concept of *legal* obligation is different from the concept of *moral* obligation. One way of being under a legal obligation to perform some act *A* is simply to be required by a legal rule to do *A*. To be under a moral obligation, on the other hand, is to be required to do *A* by the weight of all morally relevant reasons with respect to *A*—e.g., that *A* will promote human welfare, is the just or fair thing to do, etc. Because of the necessary connection with reasons of this nature, we regard moral obligations as necessarily ranging over matters of importance, but this is not necessarily so for legal obligations—

e.g., the obligation to have your auto license tab displayed before March 1. Also, moral obligations require only voluntary conduct from us. "I could not help it," if true, is always an excuse in morality, for involuntary conduct is conduct without moral fault. The law, however, can intelligibly (even if not justly) hold people responsible for their involuntary and thus faultless conduct. In the law this is called *strict* or *absolute* liability, but there is no such thing as strict moral responsibility.[15]

Finally, we think of legal obligations as changeable at will in a way that moral obligations are not. A legislature could repeal all laws against libel and slander and thus make it false henceforth that libel and slander are illegal. (Throughout most of the United States, libel and slander have ceased to be criminal offenses, either because of repeal or because of a longstanding refusal to prosecute these acts, thereby forcing individuals to view these injuries as private and seek civil remedies for them.) But what individual or collective act would make it false that libel and slander are immoral? The very idea of a legislature for morality is absurd on its face.[16] Of course a particular legislature or constitutional convention might build a substantial number of its moral beliefs into its legal system. Nobody would deny this. All this would show, however, is that there is, for this system, a *contingent* or *empirical* overlap between law and morality. This is not the kind of necessary connection claimed by natural law theory.

What all of this adds up to is the following: Moral pressure must always involve the *appeal to reason*. The sentence "This is your moral obligation but there is no good reason or justification in favor of your doing it" makes no sense. Substitute the phrase "legal obligation" for the phrase "moral obligation" in the sentence, however, and the resulting sentence, even if not admirable, is perfectly intelligible. Laws and their attached legal obligations should be rationally defensible, but, in contrast to morality, it is not of their very essence that they must be.

As one final attempt to save classical natural law theory, one might throw out this challenge to alternative theories: If we do not identify law and morality in some way, how can we account for a *moral* obligation to obey the law and thereby avoid an appeal to mere force as a ground for fidelity to law? If natural law theory were in fact the only route toward establishing a moral obligation to obey the law, then one might abandon it (if at all) only with very great reluctance—unless, of course, one holds the view that there simply is no moral obligation to obey the law as such. A close consideration of the matter, however, reveals (a) that natural law theory does a very inadequate job of establishing a moral obligation to obey the law, and (b) that there are alternative possible ways of generating such an obligation. If one holds the view that one has a moral obligation to obey the law only when the law is moral in content, one holds a view that stresses the moral obligation to obey the law in just those cases where it is least needed. (Who thinks that an important moral reason against rape and murder is that there are laws prohibiting these acts?) People are often called upon to recognize their moral obligation to obey the law in those

cases where they morally disagree with the law—e.g., the law perhaps requires that they fight in a war they regard as evil or requires that they accept a way of life, say racial integration, that they regard as contrary to the common good. It is unclear how natural law theory will illuminate such cases. Such cases may be understood, however, when one realizes that foundations for moral obligation other than morality of content may be possible. Consider promises. My moral obligation to keep my promise is generated by the *act* of promising, not by the content of what I promise. My helping you paint your fence is morally trivial and, by itself, generates no moral requirement for me. If I *promise* to help you paint the fence, however, then my doing it takes on the character of a moral requirement. Is there any important analogy between the obligation to obey the law and the obligation to keep a promise? Social contract theory claims yes, and this shows that it is at least possible that grounds for the moral obligation to obey the law other than those favored by natural law theory might be articulated.[17]

The confusions in classical natural law theory thus seem to run very deep indeed. It forces us to say confused and confusing things (e.g., "an unjust law is not really law") with no obvious gain in analytical or moral power. The important things it supposedly allows us to do (e.g., morally evaluate the law and determine our moral obligations with respect to the law) are actually rendered more difficult by its collapse of the distinction between morality and law. If we really want to think about the law from the moral point of view, it may obscure this task if we see law and morality as essentially linked in some way. Moral criticism and reform of law may be aided by an initial moral skepticism about the law—a frame of mind difficult to adopt unless the concept of law itself is demythologized—and, to put it mildly, natural law theory has not been in the business of demythologizing law. For natural law theory, the term "law" is a morally honorific title; the goals of both intellectual clarity and moral evaluation might better be served by a more neutral analysis.

Is classical natural law theory then a total washout? The answer to this question is clearly no, and it would be a shame if the reader went away from this section thinking otherwise. The philosophical reflections of every age tacitly presuppose, as unchallenged assumptions, a general worldview and philosophical idiom, and the best philosophers of the age proceed brilliantly and develop profound insights within the confines of that worldview and idiom. When the background worldview comes to seem implausible (or just unfashionable) to a later age, the proper response of that later age is to mine the earlier tradition in order to discover the insights toward which (sometimes quite obliquely) it was groping—insights that can be used and reformulated in the current philosophical idiom. By "rethinking the works of the great philosophers in the idioms of our own age" (to use Peter Strawson's phrase), we are perhaps able to pay homage to the past and learn from it without being trapped by its limitations of thought. It is surely enough that we be trapped by our own limitations of thought.

In this spirit of qualified historical piety, we shall consider in a later section if contemporary reformulations of natural law theory can avoid the charges leveled above against the classical form; it will be suggested that, to some considerable degree, they can. Contemporary natural law theories gain considerable advances in sophistication and plausibility over the classical versions in three ways: (1) They do not appear to depend on controversial metaphysical or theological theories. (2) Some contemporary natural law theorists (e.g., Lon Fuller) argue that the connection between law and morality is necessary only at the level of an entire *system*—that legal systems may, of course, contain particular laws that are unjust or immoral in some other way, but that the system as a whole must satisfy certain moral demands in order to count as legal.[18] (3) Other contemporary theorists (e.g., Ronald Dworkin) argue that too sharp a conceptual separation of law from morality will force us to miss the essential nature of certain central features of judicial deliberation—e.g., deliberation about constitutional rights.

Before exploring these contemporary developments, however, it will be instructive to consider a theory on the nature of law that was developed largely as a reaction against classical natural law theory. This theory is called Legal Positivism, and its starting assumption is that—for all the reasons already explored—a sharp distinction is to be drawn between law and morality.

Legal Positivism

John Austin, the nineteenth-century English moral and legal philosopher who gave the theory of legal positivism its first systematic statement,[19] argued that legal philosophy (jurisprudence) has two important but quite different tasks and that a failure to keep these two tasks separate produces both intellectual and moral confusion. He distinguished between *analytical jurisprudence* and *normative jurisprudence*. Analytical jurisprudence is concerned with the analysis of the concepts and structures of "law as it is." Normative jurisprudence involves the evaluative criticism of law and thus represents claims about "law as it ought to be." That Austin draws this distinction clearly shows that his whole conception of legal philosophy involves a repudiation of natural law theory. Austin's contributions to normative jurisprudence mainly involve some interesting attempts to apply the moral theory of utilitarianism to legal issues—a theme to be explored in a later chapter. The contributions for which he is most famous, however, are in the area of analytical jurisprudence—particularly his theory of the nature of law itself, his analysis of the concept of law. ("Law as it is" is called *positive law* because it is set or posited or given its position by human authority, hence the name "Legal Positivism.")

Austin's particular theory is often called "the command theory of law" because he makes the concept of *command* central in his account of law and maintains that all laws are commands, even when they do not take a form that appears imperative in nature. Why does he make such a claim?

What does Austin notice about laws that makes him think that the concept of command will illuminate their essential nature? Basically it is this: the *nonoptional* nature of legal requirements. The law is not like one's puritanical Aunt Sophie, giving all sorts of moralistic advice that one may simply ignore with impunity if one does not care to be guided by her. The law is rather a coercive method of social control: it demands both the attention and compliance of those to whom its regulations are directed. According to Austin, the locution "There is a law against X but you may still do X with impunity" is senseless. Such a "law" could not control social behavior, the very point of having laws in the first place.

What is a command? Austin defines a command in terms of two concepts: (1) signification of desire, and (2) ability to inflict evil or harm for the nonsatisfaction of a desire. To command people to do X is simply this: to express to them my desire that they do X and to make it clear to them that it is within my power to inflict some evil or harm on them if they fail to do X. Austin calls this threatened and possible evil a *sanction*. A person so commanded is, according to Austin, *bound, obliged,* or *under a duty* to do what is commanded.

Initially, this conception of command and the theory of law based upon it seems rather bizarre. Must I want or desire some outcome in order to command that you act in a certain way? Might not a sergeant, believing that his duty requires it, command a soldier to go on a dangerous patrol while secretly wishing or desiring, because he likes the soldier so much, that the soldier will in fact go AWOL rather than risk his life? Do not legislators sometimes vote out of party loyalty for laws, and thus issue "commands," when they are ignorant of the contents of those laws and thus can have no desire to realize the objective of those laws? It would of course be odd if in general people commanded others to do things in the absence of any desire that those things be done, but the connection between desire and command does not seem strong enough to make the connection between them one of definition. (Perhaps it is a necessary truth that generally people desire what they command, but even that would need to be argued.) Also, it seems odd to maintain that a person has not been commanded or ordered to do something unless there is a real possibility—not just a threat or provision but a real possibility—that the commander can make a harm or evil befall him for noncompliance. Suppose Jones disobeys a command or law and flees to Canada where (let us suppose) he cannot be reached or extradited. Does it follow from this, since no sanction is possible, that he really was not commanded at all, that he really broke no law? This view would have the extremely odd and unfortunate consequence that the more clever a person was at avoiding threatened sanctions the less it would be true that he was commanded and thus under a legal obligation at all. In order to avoid this absurd consequence, the later legal positivist Hans Kelsen suggested that all that is required for an expression of desire to have the status of command or law is that it *stipulate* or *provide* for a sanction—not that there be a significant probability that the sanction will actually be inflicted.[20]

But, even given this weakening of the claim, is it reasonable to regard the concept of sanction as essentially tied to the concept of law? Must all laws, by definition, have sanctions? There are reasons for thinking that the answer to this question is no. If we take criminal law as our paradigm of law, then the sanction theory of law seems reasonably plausible. Criminal laws typically have the purpose of preventing people from doing certain things. The method of prevention here is a price tag (a sanction): Do this and it will cost you your life, liberty, property, etc. But when we move to a consideration of other kinds of laws, the sanction theory seems less plausible. Take the rules of contract law. They exist, not to prevent us from doing certain things, but rather to *allow* us to do certain things in an official way. They take the form "If you want to do X (make this contract valid in this state, say), then you must do Y (put it in writing if the amount is over $500, say). If we fail to follow the rules of contract law, no evil is visited on us. Rather we have simply failed to do what we set out to do, namely, make a valid contract.

If the sanction theory really charms us, we could of course attempt to save it in cases like this by following Kelsen's suggestion that we distinguish between *punitive* and *privative* sanctions. To suffer a punitive sanction is to be punished by the state, as is the case in criminal law. To suffer a privative sanction is simply to be deprived of the enforcement power of the state with respect to our transactions—a way of construing what happens when we fail to follow the legal rules for making a valid contract. The degree to which it would be reasonable to embrace this complexity is a function of the degree to which one thinks it important to preserve the concept of sanction at the center of law. And that issue cannot be decided without further exploration of the theories based on sanction and a comparison of them with theories that do not regard the concept of sanction as legally central.

H. L. A. Hart thinks that he can quickly demolish sanction theories by showing that they involve a fatal confusion between the concept of being *obligated* (or under a duty) to do something and being *obliged* (i.e., forced) to do it.[21] Austin's theory forces us to say that we are obligated or duty-bound to surrender our money to a gunman in a stickup; that consequence, according to Hart, is sufficiently absurd to destroy any theory that entails it. If the gunman desires our money, expresses that desire to us, and makes it clear to us his intention and ability to inflict harm on us if we do not surrender the money, then, by Austin's definition, he has commanded that we give him the money. But, according to Austin, to have a duty just is to be under a command, so it looks as though we are forced to say (what seems absurd) that we are obligated to give the money to the gunman. Hart's criticism thus seems made. But is it? One must always be cautious in claiming to have found a simple error in a thinker of Hart's intellectual power, but it does seem in this case that he has simply begged the question against Austin. We would all of course agree that the gunman places his victim under no *moral* obligation or duty, but Austin, since he clearly wants

to draw a sharp distinction between law and morality, will surely immediately grant this point. Austin's theory is about the nature of *legal* obligation, and the nonmoral model of the command is his attempt to provide the locution that will ultimately illuminate legal obligation. Since in a very real sense he wants, as a part of his theory, to identify legal obligation with force (and thereby identify legal obligation with being obliged), it will hardly count as a refutation of his theory to point out, as Hart does, that he is confusing being legally obligated with being obliged. This is not to refute Austin's theory; it is simply to tell Austin what his theory is in slightly different terms. Thus a refutation of the command theory will have to be more systematic and subtle than this.

Hart's point about the gunman, even if it does not totally refute Austin's whole theory, does still raise one serious worry for that theory. Even if we follow Austin in ruling out all moral factors from our analysis of law and legal obligation, it still seems that his theory, as thus far presented, does have one *legally* absurd consequence—namely, that the gunman we have discussed, since he is issuing commands, is making *law*. That does indeed seem absurd.

Fortunately, Austin himself sees the absurdity of this and clarifies (and thus renders much more plausible) his thesis in the following way: Law is not to be identified with any command, it is rather a *species* of command. We of course want to distinguish those commands of the state that represent law from those lawless commands issued by our gunman, and thus, we must now look for those special distinguishing features that will allow us to tell which, of all commands, are the commands that are legal in nature. What must be added to a command to make that command a law?

Austin's answer to this question involves an idea that many philosophers (e.g., Ronald Dworkin) regard as the most original and essential feature of the doctrine of legal positivism—namely, that the legal is distinguished from the nonlegal in terms of *pedigree*. One pedigree test for law and legal validity is simply this: *L* is a law of some system *S* if *L*'s generation or enactment can be traced to a person or body of persons whose actions define legality for *S*. In Austin's terminology, such a person or body of persons is called a *sovereign* and thus Austin's final definition of law is this: A law is a command of the sovereign. True laws have this pedigree. Other commands (e.g., that of the gunman) lack this pedigree, and thus they are not laws.[22]

Is this theory correct? We are not in a position to answer this question until we first attempt to understand the concept of sovereignty itself. What does Austin mean by calling a person or body of persons a "sovereign"? Are there clearly sovereign persons or bodies present in all those systems we would correctly call "legal"? If the doctrine of sovereignty is ultimately incoherent or if it fails to illuminate the character of actual systems of positive law, then Austin's particular version of legal positivism will be of doubtful philosophical value.

Given Austin's strong desire to avoid any confusion between moral and legal matters, he clearly is not going to define sovereignty in terms of even

possibly moral or evaluative concepts. He will not, for example, define a sovereign as one who has a *right* to rule or one who rules *legitimately*.[23] Instead he offers a purely *factual* account of sovereignty:

> The essential difference of a positive law (or the difference that severs it from a law which is not positive law) may be stated thus. Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author. Even though it sprung directly from another fountain or source [e.g., custom or morality], it *is* positive law, or a law strictly so called, by the institution of that present sovereign in the character of political superior. . . . The superiority that is styled sovereignty, and the independent political society which sovereignty implies, is distinguished from other superiority, and from other society, by the following marks or characters: 1. The *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons. 2. That certain individual, or that certain body of individuals, is *not* in a habit of obedience to a determinate human superior. . . . If a *determinate* human superior, *not* in a habit of obedience to a like superior, receives habitual obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.[24]

Notice how *factual* and *empirical* is this characterization of sovereignty and law. If a person is in fact habitually obeyed by the bulk (over 50 percent?) of the population of a society and in fact does not habitually obey another, then that person is sovereign. If that person in fact expresses desires that things be done and makes a credible threat to inflict harm on those who do not do as he desires, then that person has commanded and, given his status as sovereign, this command is law.

Should we accept this as a correct account of law? There is no doubt something appealing about the elegant simplicity and power of this theory. It seems almost geometrical in its systematic attempt to explain all the very complex features of legal systems in terms of a few primitive locutions—e.g., "habit," "desire," "sanction," etc. For all of its attractions, however, it does on reflection seem not just simple but also simplistic, achieving again what Hart calls "uniformity at the price of distortion." The notion that legal validity (i.e., the status of something, a rule say, as law) is a function of pedigree is a powerful notion that is employed in later theories (e.g., Hart's own) that remain largely positivistic without subscribing to the details of Austin's command and sovereignty version of positivism. For this insight Austin is thus to be greatly credited. Much of the details of his own particular version of positivism will not, however, survive careful criticism. Let us see why this is so.

H. L. A. Hart (again, as always, the most astute critic in legal philosophy) argues persuasively that there are two basic features of legal systems that Austin's sovereign command theory either distorts or for which it cannot account at all. These are "the *continuity* of the authority to make law possessed by a succession of different legislators, and the *persistence* of laws long after their maker and those who rendered him habitual obedience have perished."[25]

To develop his point about continuity, Hart asks that we consider the fable of monarch Rex I who, upon his death, is succeeded by Rex II. Let us suppose that Rex I has issued many commands and, since he was habitually obeyed by the bulk of the population over which he ruled and since he did not habitually obey anyone else (what if he had systematically deferred to his wife?), his commands counted, on Austin's theory, as law during his lifetime. But what happens after his death? It looks as though Austin's theory forces us to say that all law has died with him. Since Rex I is dead (and is not there to be habitually obeyed) he is not sovereign and thus his former commands no longer can count as law. Can Rex II keep his predecessor's commands in their status as law by reissuing them or ratifying them? No, because Rex II has not been around long enough for it to be the case that anyone habitually obeys him, and thus he is not sovereign either. Therefore, this society is without a sovereign and, on Austin's theory, without law. But this is absurd. This theory makes the unusual situation into the typical. Normally there is orderly and lawful succession of power in society and thus continuity of authority and law: the unusual situation is the case of revolution—the case where, when the previous leader is gone, nobody really knows who is now in authority and thus what the law actually is. But on Austin's theory, given that in any transition period there will be nobody who is habitually obeyed, every transition is a revolutionary situation. How very odd.

At this point of course someone might say that we are being unfair to Austin. Surely the habitual obedience is given, not to a person, but to an *office*. This may well be true, but then the question becomes: will Austin's theory allow him to define the concept of an office in a satisfactory way? It seems not. Typically (in those societies that even have an Austinian sovereign), the office of sovereign will be defined in terms of certain legal *rules*. Such rules will typically state the criteria for sovereignty and will provide procedures for legal or rightful succession—e.g., "The sovereign is the oldest living male member of the Dingbat Clan." Such a rule provides authoritative guidance in recognizing the current sovereign and in replacing him in an authoritative way when he dies. But can Austin's theory make room for such a rule? Surely not. For Austin, all laws are commands of the sovereign, but this rule or law, since it defines who shall count as the sovereign, is presupposed by sovereignty and thus cannot be generated by it. Thus, such concepts as "office," "legal right of succession," and "legally legitimate succession" are all without a home in Austin's theory, and he cannot account for continuity of law and legal authority, one of the (thankfully) most salient features of stable legal systems.

So, too, for the fact of persistence of laws. Fortunately, when the head of state dies, those of us who live in typically stable legal systems do not normally develop the worry that perhaps all previous laws are now gone and that our system is perhaps now lawless. We do not wait anxiously to see if the new head of state will reissue all the old commands of his predecessor and thereby guarantee that the laws under which we previously lived will persist into the future. But, on Austin's theory, we would have such a worry. For even if Austin could solve the problem of who will count as the new sovereign after the old one is gone, the commands of the former sovereign would not count as laws unless the present sovereign commanded them again. Austin tries to get around this worry by a concept of *tacit command*—if the new sovereign does not actively repeal the commands of the old sovereign, then he can be said tacitly to command them and thus allow them to retain their status as law. But is there any reason to say such a thing other than a desire to save the philosophical theory that depends on it? It certainly seems an odd way to look at the matter. If certain edicts counted as law because they were enacted in accord with the rules operative in society for making laws, then *that* (i.e., that the proper rules were followed) explains why they were and still are laws. No references to commands, either explicit or tacit, seem needed.

Austin's "law is a command of a sovereign" theory would seem to be in big trouble. Why did it go so far wrong? Hart's answer is this: in our dealing plausibly (in a way that Austin had not) with the problems of continuity and persistence of law and legal authority, it was necessary to make repeated references to *rules*—rules defining offices, rules of succession, rules for making laws, etc. It is the main flaw in Austin's theory that it can make no coherent place for rules or for the concept of rules. In seeking to avoid moral rules in the analysis of legality, Austin went so far as to avoid all rules, even the legal ones necessary for analyzing legally central locutions (even his favorite one of "sovereignty"). Austin, in avoiding all normative concepts (not just the moral ones), is thus forced to attempt to analyze all legal concepts in terms of such empirical *facts* as expressions of desire, habitual obedience, probability of sanction, etc. Clever as this attempt often is, we have now seen ample reasons why it simply will not work as a comprehensive systematic theory of law and legal systems. By focusing on particular laws as instances of individual commands, Austin is blinded to the realization that typically some rule or edict *L* is a law because *L* is a part of some social *system* for generating rules—the system being in part itself defined in terms of rules. Thus, not surprisingly, later legal positivists tended to drop the command theory and the sovereignty theory and sought instead a theory that stressed legal systems (not just particular laws) and legal rules (not just acts of determinate persons). These theories are still positivistic in that they (a) insist on a sharp separation between law and morality (the rules and norms they stress will not be moral in nature), and (b) they will offer a pedigree test for legal validity—e.g., a rule will count as law if, historically, it was *generated* in a certain way (typically, if it was enacted in accord with the rules for generating laws in the society, such as

passage by the legislature). We shall shortly explore the most powerful of such positivistic theories—that developed by H. L. A. Hart.

Before moving to this discussion, however, it might be wise to pause for a moment and reflect on why a philosopher of Austin's great knowledge and brilliance could have gone so far wrong in his analysis of law. The answer, I think, is that he succumbed to a temptation that is a common danger in philosophy and often snares even the best minds—namely, the danger of becoming enamoured with too narrow a paradigm or model of what one is studying. If you think of the law around the limited paradigm of statutory criminal law, then you will be inclined to look very favorably upon the idea that law is a set of sanctioned commands. If you think of a legal system around the model of an absolute monarchy, then the idea that sanctioned commands get their status as law by flowing from a sovereign body will also charm you. (How odd that Austin should have been charmed in this way since he lived in a common law country in which the monarchy was radically limited.) But as soon as you open yourself up to the *variety* of laws and legal systems, these charms will begin to disappear. Take a legal system such as that found in the United States. Who or what in Austin's sense is the sovereign here? There is no one supreme power of command, for the legal system essentially involves a balance of power wherein each branch of government has certain legal ways of checking and balancing the other. And each branch is legally limited by certain side constraints laid down in the Constitution. The idea of a *legal limitation* on sovereign power is an obvious feature in a system such as ours, but the whole idea cannot even be regarded as sensible on Austin's theory. Are we then to say that the United States does not really have a legal system after all since it fails to have an unlimited Austinian sovereign? Certainly not. If any society has a legal system, then surely the United States does. That we have a legal system is surely far more obviously true than any abstract theory in legal philosophy, and thus it would be ludicrous to deny the former to save the latter. "Here is my theory of the nature of law, and it has the interesting consequence that England, Germany, France, and the United States do not really have laws" carries its refutation on its face. If the sovereignty theory requires such nonsense, then so much the worse for the sovereignty theory. Of course, at patriotic rallies, we often hear mouthed such platitudes as "In our society, the *people* are sovereign." But what would this mean on Austin's analysis—that we as a people habitually obey ourselves and thus express our desires to ourselves in a threatening way and thereby make law? One surely need not go on in this vein.

If one does not become overly charmed by certain narrow paradigms of law but rather remains open to the variety of law and such salient features as its continuity and persistence, one will seek a theory of law that is much more complex and systematic than the one offered by Austin. It is to such a theory that we shall now turn.

H. L. A. Hart's *The Concept of Law* (Oxford, 1961) is universally regarded as the most significant contribution to legal philosophy of this century. Prior

to Hart's book, the philosophy of law was almost never taught in departments of philosophy or was, at most, covered as a kind of perfunctory appendix to courses in social and political philosophy. And the courses called "jurisprudence" in law schools were mainly systematic overviews of actual legal doctrines or concepts that had developed in various branches of law. Hart's book changed all this. By applying the analytical and normative techniques of contemporary philosophy to law, Hart was able to develop a way of thinking about the law that provided both intellectual illumination and a basis for moral criticism. Legal philosophy or jurisprudence was suddenly both transformed and made philosophically respectable again. Today, most departments of philosophy offer at least one course in the philosophy of law and the jurisprudence courses in most law schools are now very influenced by the writings of Hart and other contemporary philosophers of law.

In *The Concept of Law*, Hart gives the theory of legal positivism the most systematic and powerful statement it has ever received and is ever likely to receive. Though in many respects derivative from the work of the Austrian legal positivist Hans Kelsen, Hart's theory manages to preserve most of Kelsen's central insights without surrounding them with Kelsen's complex prose and without preserving the obscurity and ambiguity often found in Kelsen's own development of positivism.[26]

According to Hart, Austin began the development of his command theory of law brilliantly (by the sharp separation of law from morals and by asking many of the most profound philosophical questions about law) but then ultimately wound up with a theory of law that was almost totally unsatisfactory—a theory that, in Hart's language, implausibly makes a legal system nothing more than a "gunman writ large." If we follow Justice Holmes's counsel and "view the law as the bad man views it," then the idea of law as a large bully able to enforce his commands may seem accurate. Most of us, however, do not view the legal system in which we live in this way. This is revealed, according to Hart, in our perception of ourselves as being *obligated* by law—a concept that we would never use with respect to obedience to a gunman or bully.

Why did Austin go so far wrong? We have already noted two reasons: (1) Austin makes no place for the legally central concept of *rule*, and (2) Austin adopts what might be called a criminal law rather than a civil law model of law. He views law primarily in its role as *obstacle*—as a force to keep us from doing things we want to do (just as a bully often does). But substantial parts of the civil law (e.g., the law of contracts) cannot be viewed in this way. Contract law exists, not to prevent our doing things, but rather to facilitate our doing things—to make our agreements binding, regularized, predictable, and stable. Law is here not some kind of necessary evil (as we might think of the criminal law with its mechanisms of punishment) but is rather one of the factors that makes for civilized life and complex institutions. In this loose sense of "civil law," Hart can be said to adopt a civil law model of law. His primary ideological vision of law is as a facilitator, a

problem solver, and because of this vision, he is able to do what Austin never was: to see law as a system of rules that impose obligations (not simply a system of commands that inspire fear). Austin was correct to see that a legal system is not simply a system of advice, but that it functions essentially to render certain acts *nonoptional*. But Hart (following Kelsen) argues that legal nonoptionality is normative rather than, as Austin thought, factual. The law (to use a favorite analogy of contemporary positivists) is in this respect like a game: Moving the bishop in chess in any way other than on a diagonal is not an option in chess. This means simply that nondiagonal moves are forbidden by the rules of chess, *not* that someone will hurt you if you move the bishop in the improper way. We have here then an example of a nonoptionality that is normative but not moral—it surely being a matter of moral indifference how the bishop is moved.

Hart characterizes his own positivistic theory with the slogan "law as a union of primary and secondary rules," and he begins the explication and defense of this theory in an interesting narrative way: He asks us to imagine a nonlegal or prelegal system (a social system that we would all agree lacks law) and to note the many problems and pathologies that would characterize such a system. If we then imagine the changes that we would have to make in such a system in order to cure the pathologies, we will find that we have thereby created law. Legality, in short, is a cure for the social pathology or disease that would be present in a prelegal or nonlegal world.[27]

How is a prelegal or nonlegal world (that would still be a human and social world) to be characterized? Since human social behavior is essentially governed by rules—norms telling people how they ought to behave in various circumstances—even the prelegal world will have to contain rules of some sort. Hart calls the rules that would be present in this world *primary rules*. By a "primary rule" Hart means a rule directed to all individuals in the social group telling them how they ought to act in certain circumstances—i.e., the rule is *to* them and is *about* how they ought to act. In other words, these rules function to impose duties or obligations on people. Some examples of primary rules are: "Do not marry outside the tribe," "Keep off the grass," "Do not drive over 25 miles per hour in a residential area," "Do not touch a taboo object," "Take no medicine unless approved by the poison oracle," "Always give your relatives a decent burial," "Do not steal," etc. These examples, drawn obviously from different kinds of cultures, are purposely a mixed bag, for one important question to be considered is how one tells when such rules are part of the same *system*. Why am I, for example, bound by the one concerned with speed limit and not the one concerned with the poison oracle?

What does it mean to say that primary rules impose obligations? According to Hart, this manifestly does not mean (as Austin thought) that the rules are simply ways of predicting whether or not bad things (sanctions) are likely to befall one. Primary rules impose obligations or duties in the sense that they serve as standards of criticism or justification. A rule providing for a sanction serves as a *reason* that *justifies* imposing the sanction, not a

ground for predicting the actual occurrence of the sanction. Certain persons in a society (Holmes's "bad men") may see legal rules as nothing more than devices to predict when the state is likely to harm them.[28] Such persons take what Hart calls an "external" view on rules—i.e., they see the rules not as standards that in part define their own group membership but rather (in the manner of an anthropologist viewing some primitive tribe) as simply a set of behavior patterns of a group that one observes externally and finds alien. In any viable and stable legal order, however, the majority of citizens (and certainly the majority of those involved in some official capacity in enacting or enforcing the rules) must take what Hart calls an "internal" attitude toward the rules of their legal order—i.e., they must see them as standards of criticism and justification.

Let us suppose, then, that we have a society organized by a set of primary rules imposing obligations, and let us further suppose that most or even all members of this society take an internal attitude toward those rules. What serious problems would plague such a society? Why are we inclined to say that the society lacks a legal system? (Hart, of course, sees these two questions as closely related.)

When we imagine such a society, it is immediately obvious that "only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a regime of . . . [primary] rules."[29] This is because the moment we imagine the introduction of certain common complexities into the society, we thereby imagine a set of problems with which a system of primary rules simply cannot deal. Three such problems are particularly worth noting. First, there is the problem of *uncertainty* about the rules. Such uncertainty can be of two sorts. I can be unsure if there really is a rule that prohibits what I want to do (is the injunction to take off one's hat in church simply a matter of commonly accepted etiquette, or is there really a rule that obligates me to act in this way?) or I can be sure of the existence of rules but uncertain of what I am obligated to do if these rules are in conflict, as in any reasonably complex society they are almost certain sometimes to be. (Recall Antigone's dilemma in Sophocles's play: She accepts two primary rules, "Give your relatives a proper burial" and "Obey the King." There is uncertainty about what she is obligated to do when King Creon, who regards her brother Polynices as a traitor, forbids his burial after he is killed in battle.) Since the primary rules are just a collection or aggregate of separate rules, they do not form a system; there is no authoritative way to distinguish "really is one of our rules" from "is claimed, perhaps falsely, to be one of our rules" and no authoritative way to answer the question of priority among conflicting rules.

Another serious problem that would be generated for our imaginary society would arise from the *static* character of primary rules. Circumstances (natural and social) can change radically over time, and rules ideally adapted for one set of circumstances may be radically inappropriate when those circumstances change. Sometimes one needs to develop new rules—e.g.,

rules to help curtail oil consumption when an oil shortage develops. At other times one needs to get rid of old rules—e.g., repeal of rules permitting segregated public education when it is discovered that such forms of education harm children of racial minorities. But how can one make such needed changes when there is no mechanism for such changes—only a set of rules of the "do" and "do not" variety?

Finally, there is the problem of *inefficiency*. Suppose that you and Jones recognize the same rule for making a binding agreement, but you believe that the rule has been followed and Jones does not. Is the agreement made between you and Jones binding or not? Or suppose that Smith has clearly violated a rule prohibiting an assault on you. What are you supposed to do to get the controversy between you and Jones resolved or to get the assault rule enforced against Smith? Since there are no authorities or officials (because there are no rules establishing them, only primary rules of obligation), you are pretty much left to deal with these matters on your own, thereby helping to perpetuate that "state of nature" described by Thomas Hobbes wherein human life is "solitary, nasty, brutish, and short."

A society structured only in terms of primary rules, plagued as it necessarily will be with uncertainty, rigidity, and inefficiency, does indeed look pathologically grim. What is the cure? Hart writes as follows:

> The remedy for each of these three main defects in this simplest form of social structure consists in supplementing the *primary* rules of obligation with *secondary* rules of a different kind. The introduction of the remedy for each defect might, in itself, be considered a step from the pre-legal into the legal world, since each remedy brings with it many elements that permeate law. . . . Though the remedies consist in the introduction of rules which are certainly different from each other, as well as from the primary rules of obligation which they supplement, they have important features in common and are connected in various ways. Thus, they may be said to be on a different level from the primary rules, for they are all *about* such rules; in the sense that while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.[30]

According to Hart, there are three basic and intimately related kinds of secondary rules ("rules about rules") that both cure the pathologies of the prelegal society and define the concept of law itself. These are rules of *recognition*, rules of *change*, and rules of *adjudication*. What Hart means by these is, of course, nearly self-explanatory. A rule of recognition allows one to identify or recognize the actual rules of one's society. Such a rule "will specify some feature or features possession of which by a suggested rule is taken as conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts."[31] For groups of minimal complexity, there could simply be one such rule—e.g., "Any rule on the following list is a law and nothing else is" or "The oldest living member

of the Dingbat Clan is the King, and whatever the King says is law." Thus, a rule is recognized as a law in terms of the formal property of its having the proper pedigree—a source in a law-defining document or list or in the decisions of the Dingbat King whose rulings define law for this system. (This rule could also serve, not merely to recognize rules, but also to change them and adjudicate controversies about them.)

We might think that we could also formulate some single and simple rule of recognition even for complex societies. Kelsen, for example, thought that every society had one Basic Norm (*Grundnorm*) defining legal validity for that system. We might, of course, as a kind of shorthand, state such a rule for various systems—e.g., "In England whatever the Queen enacts in parliament is a law" or "In America whatever the legislatures enact consistently with the Constitution is a law" or even "The Constitution is the rule of recognition for the American legal system." If we do make such statements for complex societies, however, it is important to remember that they are just shorthand and that the actual situation is much more complex than the simple formula suggests. In a society such as the United States, for example, the pedigree of valid law will not really be traced to one simple rule of recognition but to various rules of recognition all related to each other in subtle and complex ways. (If you want to say it is still one rule, then it will have to be a highly disjunctive one: "Law is made by doing *A*, or *B*, or *C*, or *D*, or etc., and by various complex relations among all these"—hardly a helpful notion of "one rule.") Hart writes:

> In a developed legal system the rules of recognition are of course more complex; instead of identifying rules exclusively by reference to a text or list they do so by reference to some general characteristic possessed by the primary rules. This may be the fact of their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions. Moreover, where more than one of such general characteristics are treated as identifying criteria, provision may be made for their possible conflict by their arrangement in an order of superiority, as by the common subordination of custom or precedent to statute, the latter being a 'superior source' of law.[32]

Having understood the nature of a rule of recognition as a cure for the problem of uncertainty, we can now see how other sorts of secondary rules will cure the other problems we noted in our prelegal model. Rules of change will establish authoritative mechanisms (e.g., legislatures) for enactment and repeal of rules and will overcome the static character of a system of primary rules. Rules of adjudication will establish mechanisms (e.g., courts) to overcome the problem of inefficiency present when controversy over primary rules exists. And since the rules of change (e.g., through the enactment of statutes) and adjudication (e.g., through the doctrine of judicial precedent) are sources for future primary rules, we can see that the connection between these rules and rules of recognition is quite intimate.

We have now seen what Hart means by "secondary rules": they are rules that create powers and authorities (to validate rules, create rules, and

adjudicate controversies about rules), not rules that impose obligations.[33] We have also seen how important such rules are to an understanding of the nature of legal systems. They are, indeed, the factors that give legal systems their character as *systems*. Very simply put, legal rules are all a part of the same legal system if they have the same pedigree—i.e., they can all be traced to the same rule of recognition or set of rules of recognition that define validity for that system. This device also gives us an easy way to answer, at least for the primary rules, the question of what it means to say that these rules *exist*. Some rule *R* exists as a rule in legal system *S* if its pedigree can be traced to the rule or rules of recognition defining legality for *S*. Thus: There exists (for example) a valid law prohibiting driving over 25 miles per hour in a residential area, *even if nobody ever obeys that law*, so long as the law was enacted in the proper law-creating and law-defining way. We can now thus distinguish, as Austin was not able to, the *normative* existence of a legal rule from the *factual* existence of descriptive regularity or predictability of behavior.[34]

But what about a rule of recognition? What does it mean to say that it exists? Its existence cannot be established by tracing its pedigree to a rule defining validity for the system, for it is itself the rule that defines validity for the system. Thus, at this level, talk about existence must mean something else, indeed, it must involve some factual notion of descriptive regularity. For the rule of recognition is itself identified by its being the rule actually appealed to in deciding legal controversies in a legal system. If the Constitution is in some sense the basic rule of recognition (or part of such a rule) for the legal system of the United States, then this is because citizens, legislatures, government executives, and the courts all so regard it *in fact*. If (after a revolution, say) all these persons and agencies started ignoring it, it could no longer be said to exist as a rule of recognition for American society. Kelsen put this by saying that, at the level of the Basic Norm, "legal validity presupposes efficacy." Hart puts the point this way:

> The statement that a [primary] rule exists . . . [is] an internal statement applying an accepted but unstated rule of recognition and meaning (roughly) no more than 'valid given the system's criteria of validity'. In this respect, however, as in others a rule of recognition is unlike other rules of the system. The assertion that it exists can only be an external statement of fact. For whereas a subordinate rule of a system may be valid and in that sense 'exist' even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.[35]

Hart's slogan "law as a system of primary and secondary rules" has now been elucidated, and the theory of which the slogan is a capsule summary has been revealed as one of profound scope and power. So impressive an achievement is it, indeed, that many persons after reading Hart's book believe that the question "What is law?" has now been answered once and for all, that legal philosophers can now move on to other matters. By no

means do all legal theorists share this pious view, however. Though nearly all would acknowledge that Hart has given the doctrine of legal positivism the most impressive statement and defense of which it is capable, some critics still maintain that the entire outlook and perspective of legal positivism, even at its best, seriously distorts the nature of law and legal systems, that it only achieves (to use Hart's own phrase against him) "uniformity at the price of distortion." It is to the doubts and theories of such writers that we shall now turn.

Legal Realism

According to Hart, the central concept in terms of which law is to be understood is that of a *rule*. Hart (along with many earlier positivists such as Kelsen) adopts what Ronald Dworkin has called "the model of rules"—the view that law is best understood as a system of rules.[36] Though this view has a certain undeniable appeal to those whose perspective on the law is academic (e.g., philosophy and law professors), it has often seemed misguided to many lawyers, judges, and social scientists doing empirical research on legal behavior—all persons whose contact with the actual workings of legal systems is on a day-to-day basis. Earlier in this century, a group of Americans (loosely led and inspired by Justice Oliver Wendell Holmes, Jerome Frank, and Karl Llewellyn) developed something of a movement or school in jurisprudence called "Legal Realism."[37] Declaring that "the life of the law has not been logic," Holmes ridiculed the idea that legal cases are best understood as the application of rules. If this were so, then why do so many cases get litigated (i.e., why don't people just apply the rules the way they do in chess?) and why is it that, in most cases that do get litigated, the outcome could really go either way, something one would not expect for genuinely rule-governed behavior? Perhaps, suggested Holmes, this is because the law is *not* a system of rules waiting there in a strongbox to be taken out by judges and mechanically applied to cases as they arise. The role of the judge is actually much more discretionary and creative than this. Since the "rules" allow the judge considerable free play, he or she can in fact decide the case in a variety of ways, and the way that is in fact adopted will be more of a function of such factors as the judge's psychological temperament, social class, and values than of anything written down and called "rules." It is time, in short, for more realism about the law, where "realism" is understood to mean a scientific examination of why decisions are in fact reached rather than some academic exercise about how decisions could be constructed as logical consequences of rules. Think of the law, said Holmes, as a "prediction of what courts will decide," and base your predictions of what the courts will decide, said Frank, on a good psychoanalytic understanding of judicial temperament and not on some notion of "the rules."

So baldly stated, legal realism seems overly cynical. There is no government of laws—only a government of men (judges) who can do whatever they

jolly well feel like subject only to the constraints of their own temperaments and what others in society will tolerate. They may decide cases on whim (e.g., sexual attraction to one of the parties) and, though they may be subject to moral and political criticism for this, they can be subjected to no *legal* criticism. For, since there really are no legal rules, they cannot be criticized for failing to follow such rules. And what else could legal criticism be?

Though there are no doubt some judges who behave like this in some cases, most of us probably believe that they are a minority and would not take their arbitrariness as a model for judicial decisionmaking in general. We would probably describe them as not doing their job of attempting to apply the law (thereby showing that we regard them as open to legal criticism) and would no doubt echo the sentiments expressed by Neil MacCormick:

> In the absence of much good evidence, it seems reasonable to suppose that judges and lawyers are, like all humans, capable of occasional fits of humbug and hypocrisy, or of interpreting rooted prejudices as revealed truths. But equally, they are more commonly honest and honorable, capable of real efforts at, if never total achievement of, impartiality and objectivity; through practice, moreover, they have normally done more to develop habits of impartiality than many of those who are most strident in their denunciation.[38]

Not only does the theory seem overly cynical, it also seems open to easy refutation, at least as a definition or analysis of the concept of law. Consider Holmes's slogan: "Law is a prediction of what courts will decide." Some obvious problems arise for this.[39] (1) How do we tell what a court is? Is that not itself a legal question to be answered by applying rules (what Hart would call rules of recognition)? (2) On this model what is a judge himself really doing in interpreting a law in an actual legal case? According to this theory he is not really involved in deciding or interpreting at all. He is rather involved in an attempt to predict what he will decide! But what can this even mean? (3) On this theory we can draw no distinction between what is legally relevant in judicial decisions (e.g., precedents) and what is legally irrelevant (e.g., bribes); for, simply by being a factor in a particular judge's decision, any factor thereby becomes legally relevant. In short, this theory cannot capture an obvious feature of legal decision—namely, that certain considerations (e.g., precedents) function not merely to explain a judge's decision but also rationally and publicly to *justify* that decision in terms of standards shared by (and thus definitive of) a particular legal community. Just because in hard cases there may not be a unique outcome logically demanded by the rules, it does not follow that just anything goes. (4) Even if there are some hard cases that are radically underdetermined by legal rules, it is important to see that the vast majority of legal matters never even get litigated because, given certain rules, their outcome is almost mechanically obvious. It may be unclear just what constitutes "equal protection under the laws" in an exciting and controversial constitutional case

before the Supreme Court, but it is not comparably unclear on what date one is legally required to have one's driver's license renewed in Arizona.[40]

Since lawyers and judges spend much of their time on hard cases (e.g., in law school they read mainly casebooks that contain cases so complex that they are being discussed on appeal), these persons are perhaps inclined to overestimate the underdetermined nature of legal cases and fail to see that the hard and uncertain cases take place against a background of the vast majority of cases that are reasonably clear.

How could thinkers of such obvious intelligence have put forth a theory of law so easily refuted? The answer is that it is a mistake, I think, even to interpret them as attempting to create a general theory of the nature of law of the same type as that found in Austin and Hart, and it is really a cheap shot to take a programmatic remark such as "law is a prediction of what courts will decide" as a theory of this nature. This will make the legal realists open to easy (if unfair) refutation, but it will also cause us to miss some genuine insights that they had about the nature of law and the legal process. The theory of law that seems most plausible to a person is often a function of the *perspective* of that person on the law. Legal realism is, in large measure, the *lawyer's* perspective, and though it is unlikely that this perspective is the whole story, it is almost certain that it is such an important part of the story that any legal theory that leaves it out will be seriously flawed.

The insights of legal realism are mainly negative—a deep skepticism about the model of rules. Such skepticism could still be justified (as a criticism of positivism, say) even if the realists have no plausible theory to put in its place. Indeed, it is perhaps part of the skeptical program of legal realism to be skeptical about the value of *any* general and abstract theory of the law—to suggest instead that we look at the many and varied practices and behaviors we call "legal" and seek, in a somewhat piecemeal way, to build our understanding of law from below in a gradual and accumulative way.

If we do look at the actual practice of judicial decisionmaking, we will surely be forced to admit that it is at least not obvious that in hard cases judges are simply applying rules. And though this may not mean that just anything goes, the apparent presence of judicial discretion in cases where there either are no rules or the rules are vague or conflicting might mean that more than *one* outcome is legally possible—something not compatible with the yes/no, on/off character of rules. There is nothing necessarily cynical about this view; indeed, it might be defended on moral and political grounds as providing an opportunity for an otherwise static legal system to respond to novel cases. Justice Louis Brandeis, for example, believed that in many hard cases judges have to go beyond the rules of the law and decide cases, not on subjective whim or prejudice, but on grounds of good social policy. Thus, judges (so Brandeis claimed) should be aware of the social consequences of their decisions so that they can, where allowed discretion by the underdetermined nature of the rules, make these decisions

wisely for the general good. As a lawyer, Brandeis used to present judges with lengthy briefs containing sociological data about probable impacts of various decisions and policies. Such briefs are today still referred to as "Brandeis Briefs." The elaborate argument that won the day for school integration in *Brown* v. *Board of Education*[41] was a Brandeis Brief that developed an empirical case attempting to show that segregation psychologically harmed black children. This was used to argue that segregation is "inherently unequal," thereby denying black children "equal protection of the laws."

If Brandeis was correct in his general view, then those who condemn "judicial activism" and call for a judicial policy of "strict construction" (i.e., to simply "apply the rules") are speaking incoherently, at least for hard cases. These cases are hard just because they are underdetermined by rules, and thus some kind of "activism" (i.e., judicial use of discretion) is unavoidable. The debate should thus not be over activism versus nonactivism but rather over what kind of activism (reachings beyond rules) is acceptable. A judge can appeal to perceived intentions of founding fathers, a conception of good social policy, general moral principles built into the common law, or do nothing at all; all of these (even the last) is a kind of activism because all represent ways of doing something other than simply applying rules.

The *perspective* (if not the attempts at theory) of legal realism has now been revealed as important and provocative. If legal positivism is a correct theory of law, it must hold for all law, including hard cases. These cases at least seem nondetermined or underdetermined by rules, and so they seem to constitute a counterexample to the model of rules. Recent critics of Hart and positivism (including Ronald Dworkin who certainly would not call himself a legal realist) regard this objection, first developed by the legal realists, as the most serious objection to positivism, and most contemporary debates about legal positivism now center on the question "Can legal positivism provide a correct theory of adjudication (judicial decision) especially in hard cases?" Even Hart sees this problem, accepts that it is potentially the most serious problem for his theory, and makes efforts to refine his theory in such a way that the problem will be resolved and thus any objections based on it overcome. These are matters we shall explore in the next section.

The Reemergence of Natural Law

The theories developed in legal philosophy in recent years have reached such a level of subtlety and sophistication that application to these theories of such traditional labels as "positivism," "realism," or "natural law" is likely to distort as much as clarify the issues involved. All these traditional theories contained some profound insights, and it is thus not surprising that contemporary writers tend to attempt to take the best from each. And this is, of course, as it should be, for the goal of legal philosophy is to attain the most illuminating analysis of law, *not* to make sure that one keeps one's ideological credentials pure in order to merit a certain title for one's theory.

In spite of the above caution, however, it still seems correct to say in a very general way that many contemporary writers are expressing sympathy for certain views that are not too misleadingly called "natural law" in character. These views have no grandiose metaphysical and theological pretensions, are generally free from the kinds of ambiguities and confusions that plagued those of Aquinas, and make no attempt to state a full moral theory and connect that theory to law in all sorts of implausible ways. In this sense, current natural law thinking is much more intellectually modest than the classical variety criticized in an earlier section of this chapter. What makes these current theories in any sense "natural law" theories then? Simply this: the various writers to be discussed in this section all maintain that the connection between law and morality, though not perhaps as pervasive and dominant as was maintained by classical natural law theory, is also not as loose and accidental as claimed by a traditional positivist such as Austin. There are interesting logical or conceptual connections between law and morality, and thus a full analysis of the concept of law will have to make reference to at least some moral concepts.

Even H. L. A. Hart, who still refers to himself as a legal positivist, is prepared to make certain concessions to natural law theory and articulate and defend something that he calls a "minimum content" theory of natural law.[42] It must be acknowledged, says Hart, that law and morality are both major social institutions concerned to regulate human conduct with respect to central human values. Because of this, there will necessarily be some overlap between the content of morality and the content of law—i.e., law and morality will, at least in part, be *about* the same issues and concerned with the same problems. And, since these issues and problems will in a sense be "natural" features of the human condition, it does not seem wrong to refer to the necessary overlap in content between law and morality as a concession, although a minimal one, to natural law theory. Consider these five natural facts about human beings and the world in which they live: (1) Human beings want to live and be secure but are vulnerable to assault and harm from their fellow humans. Unlike crustaceans, for example, they do not have hard exoskeletons. (2) Human beings are approximately equal in strength, ability, and intelligence, and thus, they all can benefit from schemes of cooperation and forbearance. (3) Human beings are limited in their altruism and are thus often motivated merely by self-interest. Because of this, they cannot always be counted on to cooperate and forbear voluntarily. (4) Human beings live in a world of moderate scarcity—a world where resources are too limited for each to have plenty unless cooperative schemes are adopted. (5) Human beings are limited in their knowledge and understanding and in their ability to control themselves solely on the basis of knowledge and understanding even when they do have it.

Surely, argues Hart, if human beings were radically different in these five respects (either by being more or less favored) then the nature of both law and morality would be radically different also for they are just institutional ways of dealing with these basic features of human life. And because of

this, much of our moral and legal language depends upon these features as presuppositions of its very intelligibility. Thus, these "natural" facts have more than a merely contingent or empirical connection to our moral and legal concepts. Consider, in this regard, the simple and obvious natural fact that the vast majority of humans desire to live and be secure:

> It is not merely that an overwhelming majority of men do wish to live, even at the cost of hideous misery, but that this is reflected in whole structures of our thought and language. . . . We could not subtract the general wish to live and leave intact concepts like danger and safety, harm and benefit, need and function, disease and cure; for these are ways of simultaneously describing and appraising things by reference to the contribution they make to survival which is accepted as an aim. . . . We are committed to [these values] as something presupposed by the terms of [moral and legal] discussion; for our concern is with social arrangements for continued existence, not with those of a suicide club.[43]

Thus, according to Hart, there is at least this one necessary overlap between law and morality: they are both institutions concerned, at least in part, with the same problems. Of course different legal systems could employ vastly different techniques and principles for dealing with these problems—e.g., wage labor and slave labor are both ways of dealing with the problem of raising food so that the community will survive in a world of scarcity. Since some of the legal solutions to the basic problems of human existence will be clearly immoral, it should be clear that a legal system can address itself to the "minimum content" of natural law and still be very evil.

Another contemporary writer who has defended a reasonably modest conception of natural law is Lon Fuller.[44] Fuller attempts to show that a plausible version of natural law theory (as a claimed necessary connection between law and morality) can be built from two insights basic to Hart's own positivistic theory: (1) that legal theory should concentrate on legal *systems*, and not particular laws, as the basic unit of analysis; and (2) that legal systems are (at least sometimes) profitably viewed as systems of rules. Of course, agrees Fuller, critics of natural law theory are correct when they point out that particular rules can still be laws even if deeply immoral. But could such rules still be laws if they were a part of an *entire system* that was itself deeply immoral? Fuller says that the answer to this question is no—that a system immoral in certain ways will simply fail to be a legal system because *it will fail to be a system of rules*. For what is it, asks Fuller, to control human behavior through rules? It is at a minimum to control behavior by giving people public advance warning that certain price tags attach to certain bits of their contemplated behavior and then treating them in accord with those warnings. This allows them to avoid paying the price by avoiding the behavior and renders their lives reasonably predictable and stable.

But what if the "rules" were enforced arbitrarily (i.e., like cases were not treated like), or were never published, or were generally applied *ex post facto*, or were changed constantly on a case-by-case basis, or were hopelessly vague and ambiguous, or gave officials such massive discretion that one's treatment at the hands of the state was never predictable? In a case such as this, it would be meaningless to call this control by rules at all; for the word "rule" here would be used as a joke or in some Pickwickian sense. This so-called system of rules would really be nothing more than control by the arbitrary and personal whim of those with power. Nazi Germany, especially in its final years, is used by Fuller as an example of a state controlled largely without rules—e.g., people could be rounded up by the police and detained simply on the personal whim of those in power. A system might have a few individual rules suffering from the above pathologies, but an entire system where the common practice was to act in such a secret and arbitrary way would not be a system of rules at all; and, if Hart is correct in claiming that legal systems are systems of rules, this would not be a legal system either. This account, claims Fuller, explains why we are inclined to say that Nazi Germany, in addition to all its other faults, had the fault of departing from the ideal of "the rule of law."

Why call this a kind of "natural law" account? Because, argues Fuller, a moment of reflection should make us realize that such injunctions as "Treat like cases like," "Don't apply rules after the fact," "Don't keep the rules private," etc. are all clear examples of rules demanding the moral values of *justice* or *fairness*. Probably the most easily recognized examples of injustice, indeed, are cases where a person in authority (e.g., a judge in sentencing) gives favored treatment to one party and harsh treatment to another in the absence of any legally relevant difference between them (e.g., he simply likes the looks or sex or social class of the one more than the other) and thereby treats like cases differently. (What makes two cases alike is, of course, specified by the rules.) Thus: In order to be a legal system (because in order to be a system of rules) the system must be such that the vast majority of its rules satisfy certain procedural moral demands of justice or fairness—impartial enforcement, fair notice, etc. These demands, called by Fuller "the internal morality of law" or "the morality that makes law possible," are of course only formal or procedural in nature—i.e., they impose no limitations on the *content* of legal rules. These demands would not, for example, disqualify a rule making all blacks slaves so long as the rule was public, applied to and only to the specified persons, etc. For this reason, writes Hart in commenting on Fuller's views, it should be recognized that the satisfaction of Fuller's moral constraints is still compatible with a great deal of iniquity.[45]

Finally, we need to consider the "natural law" views of Ronald Dworkin—particularly as presented in his influential book, *Taking Rights Seriously*.[46] Dworkin's views are widely discussed and debated; there are, I think, three related factors that explain this interest: (1) Much more than most legal philosophers, Dworkin uses discussion of actual legal cases in his philosophical writings. The cases are used to illuminate the philosophy and the philosophy is used to illuminate the cases in an interesting mutual interplay.

(Dworkin's insistence that legal philosophy make sense of judicial decisions as revealed in actual cases is a legacy of legal realism.) (2) Dworkin is a subtle and powerful critic of legal positivism as that doctrine is best formulated by H. L. A. Hart, and one's own views become important if they involve good criticisms of other views already regarded as important. Dworkin argues that Hart's model of judicial decision in hard cases is defective because, by overly focusing on rules, it misses the way in which such decisions often *essentially* and *necessarily* involve appeals that have to be recognized as *moral* in nature. (This is, of course, a legacy of natural law theory.) (3) Finally, in stressing the importance of legal history, tradition, and the "moral principles that underlie the community's institutions and laws" as constraints on the permissibility of judicial decisionmaking, Dworkin shows an understanding of the degree to which moral appeals in the law are radically limited. Not just any moral appeal, no matter how commendable, has a necessary place in legal decisions; only those moral appeals that form a part, either explicitly or latently, of the moral traditions of the system in question are legally legitimate. (Thus Dworkin, though not tracing all law to some ultimate rule of recognition, still accepts something analogous to the positivistic notion of *pedigree* as one important element of legal validity—a legacy of positivism present in even this harshest of positivism's critics.)[47] In short: Dworkin, perhaps more than any other writer, has attempted to draw together and synthesize the best insights of previous theories on the nature of law. Since he writes most extensively on the problems of judicial decision and since he stresses that such decisions necessarily involve a moral element, it is not too misleading to see his "natural law" tendencies as dominant in his thinking.[48] They have certainly been the dominant concern of those who have written on Dworkin.

As a prelude to a discussion of Dworkin's theory of judicial decision, let us return again briefly to legal positivism; for, since it is Hart's positivistic theory of judicial decision that troubles Dworkin and prompts him to develop an alternative account, a discussion of Hart's view on this is central to an understanding of Dworkin.

It is an acknowledged weakness of Hart's book that it does not contain a well-developed theory of judicial decision; thus, it is not clear if what he does say really represents his full view of the matter. We (and Dworkin) are limited, of course, to what Hart has actually written, and a fair (it is hoped) summary of the doctrine presented is this: Law is a system of rules. Therefore, judges are often involved in simply applying rules in a rather mechanical way. Some rules, however, contain terms that are "open-textured"—i.e., terms clearly applying to certain cases but unclear in the degree to which they apply to various "borderline" cases. Consider the term "vehicle" as it occurs in a statute forbidding the operation of a vehicle while intoxicated. It is clear that cars, trucks, and buses are "vehicles" for purposes of this statute, but what about a moped, or a bicycle, or a pair of roller skates? Here the rule is simply vague and gives the judge considerable discretion in how it will be applied. Since the rule itself does not answer these

questions, the judge cannot be said to be simply applying a rule when he or she answers them. What then is the judge doing? According to Hart, in these cases the judge is *legislating* and there is no reason to pretend otherwise. Since legislators have no way of anticipating all possible fact situations that might arise (e.g., the invention of mopeds) and since they (like the rest of us) can only be generally and reasonably clear about their aims or values, there is no way that they could draft rules that would never contain any elements of vagueness or uncertainty. The creative discretion of the courts as deputy legislators is a vital way of filling in these gaps as they arise. Hart writes:

> In fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case. . . . [When applying a vague concept], we confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best satisfies us. In doing so we shall have rendered more determinate our initial aim, and shall incidentally have settled a question as to the meaning, for the purposes of this rule, of a general word. . . . The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case. None the less, the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do *not* require from them a fresh judgment from case to case.[49]

According to Dworkin, the way to test a model such as Hart's is to examine actual legal cases and see if it illuminates or distorts those cases. Dworkin's view is that it mainly distorts. It is, he argues, far too simplistic to maintain the dichotomy that judges are either applying and interpreting rules *or* they are legislating. The legal institutions of which they are a part are in some respects too rich and in other respects too limited to support this "model of rules" that Hart offers. They are too rich in that they offer, not simply rules, but a variety of other legal standards for use in decisionmaking—some of these obviously moral in nature. They are too limited in that they simply do not give judges the kind of legislative discretion of which Hart speaks. Hart's theory of judicial decision is thus a failure and the consequences of this failure for the general program of legal positivism are enormous for reasons to be outlined later.

In order to establish his criticisms of Hart's "model of rules," Dworkin invites us to consider two legal cases (cases he takes to be representative of "hard cases"). In *Riggs* v. *Palmer*,[50] the court had to decide whether an heir named in the will of his grandfather could inherit under that will, even though he had murdered his grandfather to do so. The court admitted that

all statutes with respect to wills (the "rules") had been clearly and literally satisfied. There was nothing vague or open-textured in any of the language. These rules, "if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer." In spite of this, however, the court did not award the inheritance to the murderer. It found something to "control or modify" the rule and stated the rationale in this way: "All laws as well as contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." This was not the application of a rule but was rather the setting aside of a rule on the basis of other sorts of considerations.

Or consider *Henningsen* v. *Bloomfield Motors Inc.*[51] In this case Henningsen had bought a car and had signed a contract which said that the manufacturer's liability was limited to replacement of defective parts. Henningsen was injured because of a defect in the car and argued that the manufacturer ought to be liable for his medical and other expenses in spite of the contract he had signed accepting a limitation of its liability. No settled or established rule of law could be cited by Henningsen that prevented the manufacturer from standing on the terms of the contract, but the court sided with Henningsen anyway. Though stressing the importance of the principle that in the absence of fraud, "one who does not choose to read a contract before signing it cannot later relieve himself of its burdens" (a principle supporting the manufacturer's case), the court insisted that other factors were also relevant: (1) the "freedom of competent parties to contract is a factor of importance," (2) "freedom of contract is not such an immutable doctrine as to admit of no qualification in the area in which we are concerned," (3) there is a "special obligation" that arises in a complex and impersonal society when one manufactures a widely used, complex, essential, and potentially dangerous item such as a car, (4) "the basic doctrine that the courts will not allow themselves to be used as instruments of inequity and injustice," and (5) "the courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other." Thus: the manufacturer will be held liable, in spite of a contract limiting liability, because it takes unfair advantage of the public if its members are allowed to purchase an essential item such as a car only if they sign a contract that in effect offers them no real protection against harm.

What is most interesting about these cases, according to Dworkin, is that they do not involve appeals to rules—indeed may even involve, as in *Riggs*, an explicit override of the relevant rules. Are they then simply pieces of *legislation* as Hart would argue—uses of discretionary power to weigh social costs and benefits much in the same way that a legislature would? Dworkin answers no to this question. In these cases, the judges are certainly appealing to values; but they are not free, as a legislator would be, to appeal to simply

any value. If a Marxist legislator were elected to Congress, he could, with a perfectly coherent understanding of his institutional role, vote to eliminate schemes of private property and publicly cite as his reason his belief—perhaps also the belief of his constituents—that private property is evil, a form of theft. A judge has no comparable freedom. It would clearly involve an incoherent conception of his role for a judge to side with Henningsen and give as his reason his moral belief that capitalism should be brought to its knees and that making large corporations pay heavy damage settlements is a good step in this direction.

This kind of "legislative" discretion the judge clearly does not have.[52] The judge legitimately appeals to values, but these must be the values that in some sense inhere in or ground the system of law in which he is an official. The judges will often speak, for example, of what "the common law" teaches and will usually cite as that teaching some general standard of justice or fairness. These are moral standards, certainly; but, though they are not to be identified with the conventional practices of a particular society, they are not to be regarded as utterly divorced from those practices either. In this way they differ from the abstract and ideal moral theorizing of philosophers such as Plato and Marx who condemn the entire moral fabric of their societies as evil, from theological pronouncements of religious teachers (e.g., Jesus) who condemn their societies as sinful, and from moral visions drawn from radically different cultures (e.g., Africa or the Orient). Though not necessarily endorsing each moral prescription of his society, the judge in his proper role must be drawing upon the general moral fabric of the society in which he lives and must give reasons the relevance (if not the weight) of which would be granted by all reflective members of that society.[53]

Dworkin calls these appeals to general standards of justice or fairness appeals to *principles*, and he argues that principles differ from rules in important respects.[54] Rules, he says, are applicable in an "all-or-nothing" fashion. Consider the rules of a game such as baseball. There is a rule stating that a batter is out after three strikes. If the batter has three strikes, then he is simply out—no controversy possible. (Of course he is not out unless tagged or thrown out if the catcher drops the third strike, but a full statement of the rule would include this complexity.) An analogous rule in law would be the rule that in a particular state a valid will requires three witnesses. If there are three, it is validly witnessed. If there are less, it is not validly witnessed—no controversy. (Again, as in the baseball example, if there are exceptions allowed, then a complete statement of the rule would contain them.) And what if the rule in question conflicts with another rule? Then, because of the "all-or-nothing" character of rules, one of them has to go either by being dropped entirely, modified to allow an exception, or officially regarded as always overridden by the other in cases of conflict. If a state has the rule "no person may be denied a job because of his or her place of residence" and another rule "members of city police departments may be required to be residents of the city in which they work," then one of these rules must be invalid as it stands. One must be either dropped or

modified to make an exception for the case of conflict—e.g., the first rule could be rewritten as "no person engaged in any employment other than law enforcement may be denied a job because of his or her place of residence."

The application of principles, Dworkin argues, proceeds by a very different logic. Principles are not all-or-nothing, yes/no or on/off switches. They can be relevantly brought to bear and can be in conflict with each other on the same case. This does not mean, however, that any one must control the outcome of the case and that the ones that do not must be dropped or modified. An unmodified statement of principle may be relevant over a wide range of cases but be decisive (i.e., carry the day) in only some of them. Dworkin calls this the property (essential to principles but not present in rules) of having *weight*. For example: It is sometimes allowed that a person will profit from his own wrongdoing—e.g., the doctrine of adverse possession says that if I wrongfully walk on your land long enough I will acquire a right to walk on your land. Does this mean that the principle "no person should profit from his own wrongdoing" must be dropped or modified? No. All it means is that the principle was overridden or *outweighed by other principles* in the one case but not in the other. (Perhaps a principle relevant in adverse possession is that a person's life should not be disrupted by abruptly denying him the right to do something he had been encouraged to expect that he might freely do.) Thus: Several principles may be in conflict in a particular case. It may be controversial which has greatest weight in the case, but it should not be a matter of controversy that each is relevant and should have its claims considered. Those principles that lose out in this case (unlike a rule that might lose out) do not get dropped or modified, for the relevance of each remains intact even when it is, in a particular case, outweighed by another.

Each principle—winners and losers alike—may thus "return to fight another day" intact and unmodified. Principles are *reasons*, and a reason does not cease to be a reason, even a good reason, just because, in a particular case, some other reason was even more compelling. Showing concern for the feelings of others is a relevant reason—i.e., something any decent person should take account of—in assessing the permissibility of contemplated actions. But pursuing my own happiness in those cases where I have a right to is also a relevant reason and goes toward justifying my marrying Sophie when I want to even if I know that this will break Mary's heart. Suppose I decide to marry Sophie and regard this as justified, all things considered—i.e., in this case, especially since I never led Mary on, I conclude that my rights outweigh damage to her feelings. Does this mean that concern for others' feelings is less of a relevant or good reason in future cases—or even that it was not relevant in the case where it was outweighed?

There has been great controversy over whether or not Dworkin has succeeded in making his contrast between rules and principles clear.[55] Let us suppose for a moment that he has. We might still ask why it all *matters*.

Hart says that in hard cases judges weigh values in a quasilegislative manner in order to interpret vague rules. Dworkin says that in hard cases judges go beyond rules and weigh various principles. To what degree, one might ask, is this disagreement more than merely verbal? Both Hart and Dworkin agree that in hard cases judges go beyond rules and consider values. Why should it matter (except to those concerned with linguistic purity) whether we call this appeal to values a legal appeal to principles or a legislative act?

There are two reasons why the difference does matter. First, for reasons already noted, a legislative model does not capture the degree to which judges are limited—by the logic of their role as judges in a particular system of law—to consider only certain values. Recall that Hart does not actually say that judges are free to consider *any* value or aim. He rather says that they are to "render more determinate [the] initial aim." Thus, his model is perhaps not quite as "legislative" as it seems or even as he thinks it is. Legislatures do indeed have discretion in a strong sense—i.e., they are free (even if not always wise) to regard any issue as open for total rediscussion and change. Not so with judges. Because they are bound by the principles of the system in which they play a role, their decisionmaking process is always limited and structured by those principles. They exercise discretion only in the weak sense that they must use their judgment to do the best job they can of understanding and weighing the relevant principles.

This leads us to the second reason why the distinction between the legislative (or strong discretion) model and the principle (or weak discretion) model is important. Depending upon which model we adopt, we will hold a very different view concerning what a litigant is requesting when going before the court in a hard case. On the legislative model, the litigant is asking that the court, in considering his case, base its decision on its conception of what would represent the best policy for the good of the society as a whole. (Since the rules are too unclear to give him any rights, his role before the court must be mainly to alert the court to the need for some judicial legislation in the *hope* that the legislation will benefit him by allowing him to win his case.) On the principle model, on the other hand, the litigant is asking that the court protect a *right* that he or she has. Though there may be no decision procedure to yield a noncontroversial answer to the question "Given the weight of all relevant principles, does the litigant have a right?" the principle model claims that such a question should guide the deliberations of the court. On Hart's view, the claim "I had a right to win" makes no sense when a hard case has been lost; for rights and obligations, according to Hart, are simply entailments of legal rules. And the mark of a hard case, of course, is that it is underdetermined by such rules.

On Dworkin's view, however, the claim makes perfectly good sense if it purports to involve a marshalling and weighing of principles that is more persuasive than that performed by the court. Dissenting judges, appeals judges who overrule lower courts, and appeals lawyers make (or at least

think they make) such cases all the time; thus, Dworkin's model should surely appeal to them. These persons at least claim to be appealing and dissenting on *the law* and do not speak and write as though they think their task is merely the political one of balancing (or persuading a judge to balance) a whole range of social interests. They maintain that a certain client has a *right* to win, not simply that it would be good for that client to win. Are they deluded or does their practice rather constitute an important counterexample to Hart's legislative model of strong discretion?[56]

If Dworkin's general attack on "the model of rules" is well-founded, what general implications does this have for the program of legal positivism? There are mainly two. First, it appears that positivism's sharp separation of law and morality may be threatened, for Dworkin seems to show that principled appeals that we would all regard as moral are a central part of judicial decisionmaking. (Dworkin's examples are all drawn from Anglo-American law, and so it is unclear whether he thinks that the law-morality union is a feature simply of our legal system or will be present, in some form, in any legal system. Positivism could, of course, happily grant the former.)[57] Second, the general principles of law that Dworkin regards as central cannot be validated, as can rules, by having their pedigrees traced to some "rule of recognition." They have a kind of pedigree in their character as arguably present in the moral foundation of one legal system rather than in another, but this is a much looser notion of pedigree than that found in Hart and other positivists.

Some writers (e.g., Joseph Raz and Rolf Sartorius) attempt to "save" Hart by suggesting that we should not insist on a rigid and simple formal statement of the rule of recognition but should rather see it as flexible—either "open textured" or incompletely specified. If the rule of recognition is so characterized, Dworkin's legal principles might be traced to or be a part of a rule of recognition after all. As Dworkin points out, however, to the degree that the rule of recognition is uncertain then to that same degree will it fail to do the job of clearly identifying valid law—the main attraction and selling point of legal positivism.[58]

We have concentrated thus far mainly on Dworkin's attack on the legal positivist's model of rules and have considered his positive views only in so far as they are a part of this negative case. Before closing our discussion, however, we should explore Dworkin's own theory of law in more detail, specifically his theory of judicial decision in hard cases. He calls this theory "The Rights Thesis," and it is to this thesis that we shall now turn.

Simply stated, Dworkin's "rights thesis" is this: Even in hard cases, judicial decisions enforce *rights* on principle.[59] Indeed (to define "principle" a bit more carefully than previously), we can say that an appeal to principle just is "an argument [that] . . . a decision respects or secures some individual or group right." What is a right? It is not, as some metaphysically or theologically inclined writers of the past have suggested, some spooky charm embedded in one's soul for the purpose of warding off the threat of secular tyranny—i.e., it is not what Bentham meant to condemn when he described

natural rights as "nonsense on stilts." A right is simply a moral claim of a particular logical character. To understand this character, Dworkin suggests that we contrast rights appeals with appeals of another sort—appeals to what he calls considerations of "policy." An argument of policy (appropriately found in a truly legislative body) is an argument that some decision is justified because it advances some collective goal (e.g., general welfare) of the community—a goal established by an attempt to discover the various preferences and interests that should be taken into account. A decision to pursue a certain policy (e.g., internment of Japanese Americans after the attack on Pearl Harbor)[60] on the basis of a belief that this would promote national security and thus the general welfare would be a decision of policy in this sense, though perhaps not a rational one. Understanding what a policy or collective goal argument is, we can now see a rights argument as an argument that an individual or group must be respected or protected in a certain way on the basis of considerations other than considerations of policy. Dworkin writes (p. xi): "Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for imposing some loss or injury upon them." If one had argued against the internment of the Japanese Americans after 1941 on the ground that it is wrong, even if it furthers some desirable collective goal, to incarcerate persons who have not been convicted of any criminal offense, then one would have been offering an argument of principle—an argument that these citizens had a *right* not to be interned.[61] One might even call such a right "natural" in a harmless sense if all one means by this designation is that it is a right that, even if not currently recognized in the law, *should* be so recognized, perhaps because it is presupposed by the moral values upon which our legal order is generally based.[62]

As Dworkin develops it, the rights thesis has an interesting corollary—a thesis that might be called the "right answer" thesis. When rights are at stake, whether these are constitutional rights or a right to recover in a damage suit, there is always a right or correct answer to the question "Who has a right to win?" We are inclined to doubt this claim because there is no mechanical decisionmaking procedure that will let us know for sure if the right answer has been reached, but the absence of such a procedure for determining the right answer surely does not prove that there is no right answer. Suppose that the technology for inventing and developing microscopes never arose and could never arise because of some limitation of optics. Would this mean—just because we could never discover it—that there is no correct answer to the question "Are there organisms so small that they cannot be seen by the naked eye?" Or, more analogously perhaps, suppose that the completeness proof for the propositional calculus in logic had never been developed and never would be developed because of some limitation in the human intellect. Would it follow from this—just because we could never know—that there is no correct answer to the question "Is the propositional calculus complete?"

At the very least, Dworkin argues, the only acceptable model of judicial decision is one in which judges conceive of themselves to be searching for the right answer to the question "Who has the right?" This is their institutional role and is the main way in which they differ from legislators who may properly base decisions on a conception of collective good. The role of the courts in a democracy is not to provide one more legislative body to enact majoritarian preference; it is rather to identify and protect rights and thereby often check or limit majoritarian preference. Even the traditional and proper conception of a judge as one who gives great weight to precedent in decisionmaking only makes sense, according to Dworkin, on the basis of a principle of right—namely, the principle that it is unfair or unjust to thwart the legitimate expectations that a person developed because of previous judicial decisions in similar cases. This principle must be given weight in those cases where it is relevant; indeed, a litigant has a *right* that it be given weight. But how much weight? There is, of course, no easy answer to this question, but there is, according to Dworkin, a right answer. And it is the job of the judge to search out and articulate that answer.

We have then a model of an ideal or "philosophical" judge whose task is to search out in each hard case the right answer to the question "Who has the right to win?" This will involve a careful analysis and weighing of competing rights claims and also an articulation of a general theoretical account of rights—a theory of law—in which this case both illuminates and is illuminated by other cases. Small wonder that Dworkin calls such a judge "Hercules."[63]

Suppose we accept this general model. We agree that a judge should view himself or herself as involved in principled decisionmaking—i.e., decisionmaking that involves a search for an articulate statement and defense of rights in order that the correct answer to the question "Who has a right to win in this case?" will emerge. How will the judge do this? What intellectual goal should the judge set and what rational techniques will advance that goal? We know that an undefended and intuitive statement of rights ("Here they are—I have it by revelation!") will not do. What we want instead is some kind of *theory* of rights in which particular rights controversies can be embedded and thus resolved. But what is it to articulate and defend such a theory?

It seems that Dworkin's answer to this question, or at least the expression and emphasis of that answer, has changed over the years. In the essay where he first developed his view, Dworkin emphasized that the discovery and defense of legal principles would proceed primarily by an examination of the legal history, traditions, and conventions at the heart of a particular legal system. He wrote: "The origin of . . . legal principles lies not in a particular decision of some legislature or court, but in a sense of *appropriateness* developed in the public and [legal] profession over time. Their continued power depends upon this sense of appropriateness being sustained."[64] This appeal, though perhaps not to be identified with an appeal to convention, is closely linked to convention—close enough, at any rate, to make the task

of the judge clearly different from that of the moral philosopher. Here the task of the judge looks hard, but perhaps not yet Herculean. (Also, and not surprisingly, this way of expressing the view led many of Dworkin's critics to suspect that his differences from such positivists as Hart were not actually as great as Dworkin had suggested.)

As Dworkin later expressed his view (and this may have been the view all along) he makes the judge's task begin to look very philosophical indeed. In fact, he makes the law appear to be a kind of institutionalized moral philosophy. Dworkin now speaks of judges' responsibility "to fit the particular judgments on which they act into a *coherent* program of action,"[65] of the search for "moral principles that *underlie* the community's institutions,"[66] and even of the search for the "*soundest theory* of law . . . that will *justify* the settled rules"—a search that, by Dworkin's explicit admission, "must carry the lawyer very deep into political and moral theory."[67] Explicitly identifying himself with "naturalism" (i.e., natural law theory), Dworkin writes:

> According to naturalism, judges should decide hard cases by interpreting the political structure of their community in the following perhaps special way: by trying to find the best *justification* they can find, in principles of political morality, for the structure as a whole, from the most profound constitutional rules and arrangements to the details of, for example, the private law of tort or contract.[68]

While there is still an important link to the conventions of a particular society, the task of the judge begins to look more and more like the task of the moral philosopher—a task of not simply finding the institutionally relevant principles but also, in some sense, of rationally justifying those principles in terms of the best possible theory of justification. Even moral philosophers, in spite of their frequent pretenses to the contrary, do not operate in total independence of the actual conventions and beliefs of the societies in which they live, for their moral theories are typically a rational reconstruction of those conventions and beliefs. (They sometimes, of course, offer us the fiction that their theories transcend all conventions and are deliverances of pure reason.) Such philosophers will often criticize and reject particular moral beliefs current in their culture as rationally unjustified, but they will not regard *all* of them as unjustified; for it is the value structure lying behind the majority of beliefs that tells us what our true values really are and allows us to criticize certain of our beliefs as inconsistent with the dominant thrust of our dominant morality. For example: John Rawls, one of the most important moral theorists of recent years, argues that a moral principle is rationally justified if it puts "us" into a state of "reflective equilibrium" with respect to the largest set of "our" pretheoretical moral convictions—i.e., if it orders and systematizes and rationalizes those convictions for "us" in a satisfying way. But what are these references to "us" and "our" if not to persons very like us, or idealized versions of us, with conventions and beliefs rather like our own? (Would the moral theory of

a Harvard philosophy professor be likely to put a morally sensitive citizen of China or India or Japan in a state of "reflective equilibrium"—or even members of all social classes in our own society?)[69] The "rational morality"/ "conventional morality" contrast begins to lose its clarity.

Another contrast that begins to lose its clarity is that between contemporary legal theory (as practiced by Dworkin) and contemporary moral theory (as practiced by Rawls, say). A blurring of this distinction is part of Dworkin's purpose, of course, because he seeks to challenge "the orthodox idea that legal standards can be distinguished as a group from moral or political standards."[70] One thing, however, is clear: To the degree that the rights thesis and the right answer thesis both depend on moral theory, then to that same degree will they be rendered suspect if moral theory is suspect. That is, if there are no right answers in morality, this may make the search for such answers in law a vain one. In criticizing Dworkin, the philosopher Alasdair MacIntyre makes just this point. He writes:

> Moral philosophy, as it is dominantly understood, reflects the debates and disagreements of the culture so faithfully that its controversies turn out to be unsettlable in just the way that the political and moral debates themselves are. . . . Important conclusions follow for constitutional theory. Liberal writers such as Ronald Dworkin invite us to see the Supreme Court's function as that of invoking a set of consistent principles, most and perhaps all of them of moral import, in the light of which particular laws and particular decisions are to be evaluated. [Dworkin suggests that we should view the *Bakke* case in this way, criticizes the court for the degree to which it politicized the decision rather than making it one of pure and consistent principle, and attempts to articulate the principles the court should have used.] But even to make such an attempt is to miss the point. The Supreme Court in *Bakke*, as on occasion in other cases, played the role of a peacekeeping or trucekeeping body by negotiating its way through an impasse of conflict, not by invoking our shared moral first principles. For our society as a whole has none.[71]

We have now reached a point where we can neither understand nor evaluate Dworkin's fully developed theory without a detailed exploration of moral philosophy and its application to law. Dworkin's theory that legal reasoning is often moral reasoning cannot be understood simply in terms of a few vague and high-sounding remarks about rights and principles coupled with a set of arguments showing where a positivistic theory goes wrong. Hart's positivistic model of quasilegislative discretion was tested by Dworkin through an examination of some representative legal cases (*Riggs* and *Henningsen*) and his own theory needs to be subjected to a comparable test to see if his moral reasoning model illuminates or obscures the legal issues involved. Some of Dworkin's best case studies occur in the area of constitutional law—perhaps the most obviously moralized branch of law in our society. (It is sometimes said of Dworkin that he is not, like Hart, offering a philosophical theory of law that would hold for all cultures but is really offering a philosophical theory or reconstruction of United States constitutional law.)[72]

Thus, both to understand and assess Dworkin it will be useful to examine moral theory and its application to law, especially constitutional law. The legal value of the study of moral theory is not, however, limited to those with an interest in Dworkin. Even those legal positivists who are in total disagreement with Dworkin should also find this project worthwhile; for, even though they do not think that morality is in any sense to be identified with law (and thus has no role in analytical jurisprudence), they will surely be concerned with the moral evaluation and criticism of law, i.e., with normative jurisprudence.[73] Neither is the importance of moral theory limited to constitutional law, for it is hard to imagine any area of law that does not generate problems of moral analysis and evaluation.

We shall thus begin, in the following chapter, an examination of moral theory and its attempt to answer these questions: What is moral reasoning? Can such reasoning be put on an objective foundation or is it ultimately a matter of subjective or culture-relative opinion and preference? What is the proper role, if any, for systematic theories in morality? How, if at all, can such reasoning and theories be properly applied either within or to the law?[74]

The Attack on Traditional Jurisprudence: Critical Legal Studies and Feminist Jurisprudence

Before moving to a discussion of moral theory and its relation to legal theory, we shall pause briefly in order to consider a radical challenge that has recently been presented to the legitimacy of the traditional understandings of both of these enterprises. This is the challenge presented by Critical Legal Studies (CLS), including its feminist wing. It will not be possible, in a brief compass and in a book obviously committed to the traditional approaches, to present a detailed development of the ideas of this many-faceted and controversial movement in legal education and legal theory. The intention here is simply to give an overview of some basic themes and to provide a list of sources for the reader who wishes to pursue these themes in greater detail.

The basic ideas of CLS are best seen, at least initially, as an attack on the idea of *neutral principles* in law and morality.[75] By neutral principles I mean those principles that can be agreed to by all rational beings. These principles may be regarded, at least within the liberal tradition, as general principles of justice, fairness, or equality—e.g., John Rawls's idea that all persons should enjoy the most extensive liberty compatible with a like liberty for others, or Ronald Dworkin's idea that each person is owed equal respect simply by virtue of being a person, or the idea that the U.S. Constitution properly provides for each citizen "equal protection under the laws." Although the exact nature of these principles has been widely debated within the liberal tradition, it is generally agreed that such principles hold true and that the job of moral and legal theory is to articulate the correct formulation of them.

Drawing on ideas of Nietzsche, Marx, Freud, and contemporary continental philosophy and literary theory, the advocates of CLS seek to brand this liberal agreement as a hopeless and dangerous illusion. Coupling the rule-skepticism and legal activism of Legal Realism with a left-wing political agenda, CLS writers argue that both legal and moral doctrines are in fact merely after-the-fact rationalizations of a basic and hidden social reality—namely, political or power relations and the deep inequalities that such relations inevitably incorporate. These doctrines thus function to protect the interests of those having power against those who are powerless by fostering the legitimating illusion that the power inequalities are *just* in some neutral rational sense. This illusion helps to block the only step that the powerless might otherwise take—namely, being willing to disrupt the status quo and attempting to gain greater power. People who think that there are principled objections to their doing so are less likely to do it; and this is one reason why radical CLS advocates want to ridicule the very idea of objective principles—claiming that these are simply superstitions that the powerful use to keep the powerless in their place. (One is reminded of Marx's claim that religion—including its associated morality—is the opiate of the masses.) So interpreted, the CLS perspective can be seen as a radical value relativism or skepticism, which holds that once one fully understands the causal origins of values (as an outgrowth of power relations), one will no longer take value claims seriously and will thus not see them as an obstacle to the pursuit of one's own political agenda.[76] Here the influence of Nietzsche is enormous; and, in order to understand the philosophical and cultural background of CLS, it might be useful to consider briefly his account of the origin and nature of values.

In such books as *Beyond Good and Evil* (1886) and *The Genealogy of Morals* (1887), Nietzsche developed what may be called a theory of "moral inversion" or "the inversion of values." He viewed morality as a cultural artifact that evolved to rationalize and protect the interests of particular classes of people; and thus he claimed that we could expect as many different moralities as there are social classes, and that we might also expect that some of these moralities would evolve as reactions against others. The classes of people that most interested Nietzsche were the strong and the weak, the powerful and the powerless. Each class, according to Nietzsche, would develop its own morality—the strong developing what he called a "Master Morality" and the weak developing what he called a "Slave Morality." The latter, developing in reaction to the former, would "invert" the values of the former—e.g., whereas the Master Morality would regard strength and arrogance as virtues and meekness and humility as vices, the Slave Morality would invert these values and come to regard the former as vices and the latter as virtues. The psychological mechanism explaining this inversion was, according to Nietzsche, quite simple: A person who cannot live up to the dominant values of his culture (e.g., he is weak in a culture that values power) is threatened with utter loss of self-esteem and feelings of worthlessness—in short, with humiliation. He can avoid such self-destructive feelings, however, if he can somehow persuade himself that the values of

the dominant culture are in fact themselves corrupt and that, contrary to the dominant belief of his culture, he has the traits that are truly worthy. If a group of persons come to share such an inverted perspective on values, then a new moral subculture is born. Thus did Roman oppression, according to Nietzsche, give birth to the Christian ethic of love and humility—an ethic born of resentment and envy of those in power and of a desire to develop an alternative scheme of values that would allow the weak to validate their own worth. Thus do slaves literally make a virtue of necessity.[77]

If we adopt this Nietzschean perspective on values, several important consequences follow: (1) Since values are simply a product of power relations, there is no moral truth or objectivity and thus no point in taking morality very seriously as a fundamental source of social (including legal) evaluation and criticism. (2) One would expect a complex culture, a culture with several subcultures of differing values, to manifest overall a radically inconsistent scheme of values—one that could not be unified, as Rawls and Dworkin seem to hope, in a single comprehensive moral theory that would be equally compelling to all rational members of the community; for such a theory would inevitably be biased in favor of some views and beg the question against all others. (The inherent contradictions of values in liberal society is a major theme in CLS writings.[78]) (3) The values of the powerless classes, although they may allow these classes to adapt to their powerlessness with some tranquility and illusion of self-respect, function through this very mechanism to keep them powerless. The stated public values of a culture function to validate and maintain oppression—a point we will always miss if we study only a culture's public value rhetoric (what Marx calls the ideological superstructure) and fail to probe the underlying substructure of exploitive power relations.

To get an idea of how this abstract doctrine about values might be used in an attempt to illuminate particular legal issues, let us consider the example of feminist jurisprudence. Feminist jurisprudence is the branch of CLS that stresses the degree to which the doctrines of the dominant legal and moral culture contain a tacit bias against women. These doctrines must be understood, at least in part, in terms of the exploitive power that men have over women in a patriarchal society.[79] I will briefly consider just one example here: the "utmost resistance" requirement in the common law of rape.[80]

Rape has traditionally been defined as a man forcing a woman to have sexual intercourse against her will and without her consent. A crucial question with respect to this definition is, of course, how such concepts as "force" and "consent" and "against the will" are to be understood. The traditional common law doctrine is basically this: A woman will be presumed to have consented to sex unless she resists her attacker to the utmost. The following exerpt from the 1906 Wisconsin case of *Brown* v. *State* illustrates this doctrine in action:

> Not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be

> shown to persist until the offense is consummated. . . . When one pauses to reflect upon the terrific resistance which the determined woman should make, [the absence of bruises on this victim's body is] well-nigh incredible.

Even those jurisdictions that have adopted a "reasonable resistance" requirement in place of the "utmost resistance" requirement can have judges thinking and writing as did this one in the 1981 Maryland case of *State* v. *Rusk*:

> While courts no longer require a female to resist to the utmost or to resist where resistance would be foolhardy, they do require her acquiescence in the act of intercourse to stem from fear generated by something of substance. She may not simply say "I was really scared," and thereby transform consent or mere unwillingness into submission by force. These words do not transform a seducer into a rapist. She must follow the natural instinct of every proud female to resist, by *more than mere words*, the violation of her person. (italics added)

Feminists have understandably been outraged by these doctrines of resistance; and they argue that the doctrinal refusal to accept that a woman's "no" *means* "no" can be explained only in terms of male models of conflict and male ideals of female sexuality—in other words, that the perspective of women on these matters has (not surprisingly) been left out by the males in a male-dominated society that drafted rape laws, no doubt largely in order to protect their own interests. By focusing on some idealized notion of "proud female" chastity and virtue (which men value in their wives but not in other women on whom they habitually prey), men fail to appreciate the true nature of rape: as a violent crime that often threatens the physical well-being and even the lives of its victims. To ask a woman to risk such harm (as any resistance requirement clearly does) is to impose upon her a model of conflict that is essentially male and foreign to both the biological and social nature of women. Men typically are physically larger and stronger than women (thus often making resistance of a woman to a man much more dangerous than the resistance of a man to another man), and woman have typically not been socialized to relate to others in a confrontational and combative way.[81] Thus women are put at risk, and made highly vulnerable to rape, if the "schoolboy fight" model of conflict is applied to them—if it is assumed that they consent to sex in any case where they do not respond to physical threats in the way that men think that men should. Thus to the degree that rape law incorporates the utmost resistance requirement, then to that same degree it is exploitive of women—a fact that becomes immediately obvious the moment one asks the question, "If women had drafted rape law, would it ever have contained the utmost resistance requirement?" Surely any honest person, male or female, would have to admit that the answer to this question is clearly *no*.

We may then grant, I think, the legitimacy of some feminist and other CLS *concerns*. What is not obvious, however, is why these concerns require

a total break with traditional jurisprudence and the need for totally new legal theories and new ways of thinking about morality and the law—e.g., Marxism. On the issue of rape law discussed above, for example, the liberal would no doubt say that the most natural way to express sympathy with the feminist point and to argue for legal reform is not to abandon or ridicule the traditional moral talk of rights and justice but, rather, to note that here is an area of the law where the valid and important liberal notions of rights and justice have not been honored. In short, these laws should be changed because they are obviously *unfair* and *unjust* to women, and because they fail to show women the *respect* that they are owed as persons. *This* is why we should care about the feminist concerns that have been raised. So, at any rate, would the traditional liberal argue.[82]

If we took literally the radical value relativism and skepticism taught by some advocates of CLS and feminist jurisprudence, however, we would seemingly be deprived of any language through which those persons could attempt to persuade others to *care* about the issues they raise. If morality and legal justice are simply bourgeois illusions, expressions of nothing but power, then why cannot I (a rich white male, say) properly state the following to those who would cloak their protest at their perceived oppression in the CLS language of relativism and skepticism: "On your own view (that notions of justice and moral respect are illusions), you cannot be claiming that the treatment you receive is objectively wrong; for, on your view, there is no such thing as objective moral wrong, since my moral values simply express my position of relative power while yours express your position of relative power. Thus, on your own view, you cannot fault me if I say 'Thank God I happen to have the greater power, so screw you!'" The coherence of this response shows that the chickens of moral relativism and skepticism might come home to roost in ugly ways, and thus they are—so the traditional liberal might claim—the very last doctrines one would want to preach if one wanted to get those who in fact have power to care about those who may be abused by that power.

Not all advocates of CLS and feminist jurisprudence offer so facile a relativism, however, and thus not all are so easily rebuked. There is more to be studied in these movements, and it should be studied in the writings of those sympathetic to them. This brief section has attempted to give the reader only a small taste of some complex and controversial issues; those wishing a full meal are encouraged to consult the menu in the suggested readings for this chapter.[83]

Notes

1. H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), chap. 1 (hereinafter cited as *CL*).
2. *Clingenpeel* v. *Municipal Court*, 108 Cal. App. 3d 394, 166 Cal. Rptr. 573 (1980).
3. *People* v. *Jordan*, 75 Cal. App. Supp. 2d 1, 142 Cal. Rptr. (1977).
4. *McPherson* v. *Buick*, 217 N.Y. 382, 111 N.F., 1050 (N.Y., 1916).

5. The basic right to privacy case is *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The basic abortion case is *Roe* v. *Wade*, 410 U.S. 113 (1973). Specifically the Supreme Court held that a woman's right to privacy encompasses the right to have an abortion during the first trimester of her pregnancy subject only to her ability to find a licensed physician willing to perform it. (The woman's right to privacy does not require forcing a doctor to perform an abortion nor does it require that the state pay for the abortion—only that her seeking the abortion not be actively inhibited by the state. See *Maher* v. *Roe*, 432 U.S. 434 [1977]). After the first trimester, the Court held, the state may regulate abortions because of an interest in protecting the mother's health (starting with the second trimester) or, because of the interest in the fetus as future human life, ban abortions entirely beginning with the third trimester.

6. See Thomas Aquinas, "The Essence of Law," in *Introduction to St. Thomas Aquinas*, ed. Anton C. Pegis (New York: Random House, 1948), 609–50. For a discussion of the various forms taken by classical natural law theory, see A. P. d'Entreves, *Natural Law* (London: Hutchinson, 1951). For a discussion of the influence in England and America of the natural law tradition—particularly the "natural rights" formulation that arose during the Enlightenment, see Sir Ernest Baker, *Traditions of Civility* (London: Cambridge University Press, 1948). The natural rights moral tradition will be discussed in Chapter 2.

7. The first sustained philosophical discussion in our civilization of the moral obligation to obey the law occurs in the Platonic dialogues *Euthyphro, Apology*, and *Crito*. (In these dialogues Plato reports teachings of his teacher Socrates.) For an excellent discussion of these dialogues, see A. D. Woozley, *Law and Obedience* (London: Duckworth, 1979). See also "Violence and the Socratic Theory of Legal Fidelity," in Jeffrie G. Murphy, *Retribution, Justice, and Therapy: Essays in the Philosophy of Law* (Dordrecht and Boston: D. Reidel, 1979). Socrates presents an early statement of what has come to be called a "social contract" justification for moral allegiance to government—i.e., for a prima facie moral obligation to obey the law. It should not simply be assumed, of course, that there is such a prima facie obligation. Common as is the view that moral allegiance is owed to the law itself (i.e., that "because it is the law" is always a morally relevant reason in favor of action), this view may be (as is the case with many commonly accepted views) so much superstitious claptrap. For a sustained defense of the skeptical view, see M. B. E. Smith, "Is There a Prima Facie Obligation to Obey the Law?," *Yale Law Journal* 83 (1974):950. It is important to realize that those who argue against a prima facie obligation to obey the law are not denying that people often (perhaps most of the time) have good moral reasons for obeying the law, but simply that "because it is the law" is not among those reasons.

8. For Aristotle, all moral requirements are discoverable by reason's study of the law of nature. For Aquinas, certain moral requirements have to be learned through revelation. Since God's natural law will never be inconsistent with His revelation, however, the natural law can be used as a moral test for human law. The relevance of nature (e.g., biology) to ethics is explored at an elementary level in Jeffrie G. Murphy, *Evolution, Morality, and the Meaning of Life* (Totawa, N.J.: Rowman and Littlefield, 1982). Some of the discussion in this section draws on this book.

9. Aquinas does not say that the law of nature requires that a person act in accord with all common and frequent (and in that sense "natural") temptations—e.g., the temptation to be violent or to engage in "perverted" sexual activity. When Aquinas speaks favorably of the "natural inclinations" of human beings, he means those inclinations that are, in his view, "proper." The problem with this, of course, is that to the degree that "natural" means "proper," then to that same degree is natural law theory merely restating moral beliefs rather than giving any independent reasons for those beliefs. "It is wrong because it is unnatural" begins to sound suspiciously like "It is wrong because it is wrong (improper)." Aquinas's own condemnation of homosexuality as a crime against nature seems to involve such circularity, and it may get what plausibility it has simply because it restates (rather than argues for) a commonly held conventional moral prejudice. (Those who are eloquent spokesmen for our own prejudices always strike us as wise.) For a clear example where natural law talk seems to do just this, consider this remark by St. Paul: "Judge it yourselves: is it comely that a woman pray unto God uncovered? Doth not even nature itself teach you, that, if a man have long hair, it is a shame unto him? But if a woman have long hair it is a glory to her: for her hair is given to her for a covering." It is a possibility, of course, that all moral recommendations are ultimately nothing more than ways of expressing shared conventional beliefs and feelings. Natural law theory certainly maintains that it is doing more than this, however.

10. G. E. Moore, *Principia Ethica* (Cambridge: Cambridge University Press, 1903). Even if Moore is correct in claiming that one may not *derive* values from facts, it does not follow from this (as the later discussion of Hart's "minimum natural law" theory will show) that there are no interesting conceptual or logical connections between facts and values.

11. Aquinas, "The Essence of Law," 637. Aquinas writes as follows: "This is the first precept of law, that good is to be done and promoted, and evil is to be avoided. All other precepts of the natural law are based upon this."

12. Alf Ross, *On Law and Justice* (London: Stevens, 1958), 261.

13. Aquinas, "The Essence of Law," 615, 633, 649.

14. The following discussion of the differences between moral and legal obligation is drawn from Hart, *CL*, 169 ff. See also his "Legal Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958):593. As the later discussion of Ronald Dworkin will reveal, the whole issue may turn out to be a bit more complex than Hart suggests; for Dworkin will argue that the distinction between moral and legal obligation is ultimately not as sharp as it initially seems—a claim that will reveal Dworkin as in some sense a contemporary defender of natural law theory. Other critics of a very different persuasion will suggest that it is misleading even to use the concept of legal obligation because of its misleading moral overtones. They will suggest replacing talk of legal obligations with talk about legal *requirements* (as opposed to legal permissions) and will argue that references to legal obligations are simply misleadingly redundant ways of making this simple point—i.e., that "there is a legal requirement that *P*" is not a reason in support of the claim "there is a legal obligation that *P*" but just another way of saying the same thing. Some would also regard Hart's characterization of morality as controversial (e.g., see note 15 below).

15. What about cultures such as the one present (according to Sophocles in *Oedipus Rex*) in ancient Thebes—a culture that condemned Oedipus as vile even though he acted in nonculpable ignorance when he killed his father and had sexual relations with his mother? Is this not a notion of strict or absolute moral responsibility? Perhaps, though the issue is complex. Some writers have suggested that the culture described had standards of conduct that were not really moral in nature but are to be understood under some different model—e.g., a *shame* (and thus quasi-aesthetic) model or a *disease* model (a model where the person who acts contrary to rules must be exiled as "polluted" or "unclean" much as we once quarantined persons with tuberculosis).

16. As John Rawls has argued, a legislative body produces a directive to be acted upon, not a proposition to be believed. The remark "The legislature directed this but I believe it is wrong" makes perfectly good sense in the way that the remark "This is immoral but I don't believe it" does not. See John Rawls, "Legal Obligation and the Duty of Fair Play," in *Law and Philosophy*, ed. Sidney Hook (New York: New York University Press, 1964).

17. In an early essay (*supra* note 16) John Rawls argued for the moral obligation to obey the law in this way: I can have a moral obligation to obey rule *R*, even if I disagree with the moral content of *R*, if I accept, on moral grounds, a *procedure* for controversy resolution (i.e., a procedure for generating laws) and *R* flows from that procedure. Suppose I subscribe to the principle of majority rule as a procedure that, in the long-run, promotes both utility and fairness. I realize that the procedure will work—i.e., will produce its benefits—only if people defer to its results even in cases where they disagree (even on moral grounds) with the results. I expect others to do this and thus it is only "fair play" that I do likewise. This obligation of fairness is only prima facie, of course, because it could be overridden if *R* is sufficiently evil—e.g., if it mandates genocide. Of course if the rules generated by the procedure are generally or typically immoral, then there would be little reason for giving that procedure allegiance in the first place. For various reasons, Rawls has now abandoned this account and offers a different theoretical foundation for moral allegiance to law, based on the idea that we have a "natural duty" to support just institutions, in his *A Theory of Justice* (Cambridge: Harvard University Press, 1972). For a powerful attack on all attempts to provide a moral foundation for allegiance to law, see Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper and Row, 1970).

18. Aquinas occasionally says things that suggest that it might be possible sympathetically to reinterpret or reconstruct his theory as applicable to systems rather than particular laws. See, for example, the section "Whether Every Law is Derived from the Eternal Law" at pp. 632 ff., *supra* note 6. It may be that, in spite of all the problems noted, Aquinas has succeeded in establishing one logical or conceptual connection between law and morality. Let us assume that Aquinas has given us only a theory of the ideal, or perfect, or paradigm case of law (a paradigm exemplification of the rule of law) and let us suppose that he has demonstrated that, at least for such a case, the satisfaction of moral requirements must enter into the analysis. This would show a conceptual connection between law and morality, because it is not the case that the ideal or perfect or paradigm instance of every institutional human activity has a moral dimension—i.e., not all perfection is moral perfection. Some ideal cases (e.g., the paradigm ballet) will involve aesthetic perfection. This possible way of establishing a conceptual connection between law and morality occurred to me after conversations with my colleague Michael White, and I am grateful to him for discussing these matters with me. Three persons whose opinion I greatly value—Merrilee Salmon, Michael White, and A. D. Woozley—took me to task for my treatment of classical natural law theory in an earlier draft where, in their view, I took too many cheap shots at a theory with which I obviously have little sympathy. I recast this section under the influence of their criticisms and, though I know that I have not gone as far toward sympathy as they would like, I hope that they will agree that the shots are now at least a bit more expensive.

19. John Austin, *The Province of Jurisprudence Determined*, 1832. This is most easily available in the edition edited by H. L. A. Hart, published in London by Weidenfeld and Nicolson in 1954. Also important are the *Lectures on Jurisprudence*, 1885.

20. See the discussion of Kelsen at note 26 below.

21. This discussion occurs in Hart, *CL*, 80 ff.

22. According to Austin, the sovereign commands that constitute laws must also be *general*—i.e., ranging over *kinds* of people and *kinds* of acts. (This is Austin's sole notion of a "rule.") See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 17 for the claim that a pedigree test defines legal positivism. Some writers have argued that the concept of pedigree is too narrow to capture the positivistic test for law—that what is essential is that the test be formal (i.e., independent of content) and that a pedigree test (with its emphasis on historical ancestry) is simply one kind of formal test. For example: "All the rules written on that wall over there are law and nothing else is" is a formal test, but not a pedigree test. According to other theorists, the essence of positivism is simply that there is a test for law that is a conventional social rule (what H. L. A. Hart, as will be discussed later, calls a "rule of recognition"). For a detailed discussion of the controversy concerning the essential nature of legal positivism, see Jules Coleman, "Negative and Positive Positivism," *The Journal of Legal Studies* 11 (January 1982):139–64.

23. The history of political philosophy is filled with competing tests for sovereignty. One of the most memorable occurs in the film *Monty Python and the Holy Grail:*

Peasant 1: "There goes the king."

Peasant 2: "How do you know he's the king?"

Peasant 1: "He's the only one who isn't covered with shit."

(Query: Is this a semantic criterion for characterizing the sovereign, or simply an epistemological test for discovering the sovereign?)

24. Austin, *Province*, Lecture VI.

25. Hart, *CL*, 50.

26. Though difficult and often obscure, the writings of the Austrian Hans Kelsen are monumental works of twentieth-century jurisprudence. It is thus regrettable that limitations of space do not permit an extended discussion of his views here. His major works are *Reine Rechtslehre*, 1934, published in English translation as *Pure Theory of Law* (Berkeley: University of California Press, 1967) and *General Theory of Law and State* (New York: Russell and Russell, 1961). For a summary and critical discussion of some of Kelsen's views, see Martin Golding, "Kelsen and the Concept of 'Legal System,'" in *More Essays in Legal Philosophy*, ed. by Robert S. Summers (Berkeley: University of California Press, 1971).

27. Hart, *CL*, chap. V.

28. It is misleading to call all such persons "bad," because some of them might view the legal system in which they live (e.g., Nazi Germany) in this way because they regard it as morally deplorable. Persons who view the laws under which they live in a purely external way are perhaps better thought of as *alienated;* and there is a whole spectrum of reasons why a person might be alienated from the system in which he or she lives—reasons all the way from being evil or a psychopath (a bad person) to being a saintlike moral critic.

29. Hart, *CL*, 89.

30. Ibid., 91 ff.

31. Ibid., 92.

32. Ibid., 92–93.

33. Hart writes: "Many of the features which puzzle us in the institutions of contract or property are clarified by thinking of the operations of making a contract or transferring property as the exercise of limited legislative powers by individuals" (ibid., 94). Thus, secondary rules are not simply rules that illuminate the conduct of officials; they can illuminate the legal conduct of private persons as well. The

citizen's relations to the law is not simply that of being under duties; the law also gives citizens authoritative *powers*.

34. These matters are discussed by Hart in chapter VI of *CL*. Hart has provided a way of showing what it means to say that a particular rule exists as a legal rule in a system even if it is never obeyed. He acknowledges, however, that such cases must necessarily constitute a minority. If all or most of the rules were ignored, there would be no system of rules at all. Thus: "This is a law and it is generally obeyed" is not a necessary truth, but "Most of the laws of the system are regularly obeyed" is a necessary truth. For a sophisticated discussion of these matters, see A. D. Woozley, "The Existence of Rules," *Nous* 1 (March 1967):63–79.

An interesting puzzle is posed by the fact that courts are normally very reluctant to enforce rules that have gone unenforced for a very long time (the problem of *desuetudo*). Is this because the rules have ceased to count as laws? But if so, why? This is a troublesome question for Hart if these rules do satisfy the pedigree test of traceability to a rule of recognition. It is, of course, often *unfair* to suddenly apply a rule to persons who had been led to expect that the rule was dead. But is this simply a moral criticism of applying such laws (a ground why legislatures might explicitly repeal them) or is it a legal criticism (a ground a judge might properly use to void new attempts at enforcement)? These questions may be illuminated in the discussion of Ronald Dworkin later in this chapter.

35. Hart, *CL*, 107. As Hart sometimes puts it: at the level of the rules of recognition, "the only thing that succeeds is success."

36. Ronald Dworkin, "The Model of Rules," *University of Chicago Law Review* 35 (1967):14.

37. For a good general discussion of legal realism, see Chapter 5 of Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington, Ky.: University Press of Kentucky, 1973). For a powerful statement and defense of a generally realist outlook ("The function of a judge is not mainly to declare the law, but to maintain the peace by deciding controversies") see John Chipman Gray, *The Nature and Sources of the Law* (New York: Macmillan, 1921).

38. Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), 17.

39. This attack on legal realism is adapted from Hart's in Chapter 7 in *CL*. It will later be suggested that the attack may involve a few cheap shots.

40. This is a matter of degree, of course. As was noted in the earlier discussion of the rule that one may not drive a vehicle while intoxicated, a rationally cautious person will not adopt an attitude of absolute certainty with respect to any legal rule that there can be no problems in its meaning or application.

41. 347 US 483 (1954).

42. Hart, *CL*, 189 ff. Hart's account here of the relation between law and morality is very much influenced by that presented by Thomas Hobbes in *Leviathan* (1651).

43. Ibid., 188.

44. Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

45. Hart, *CL*, 202.

46. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), hereinafter cited as *TRS*. The paperback edition of this book (Cambridge: Harvard University Press, 1978) contains as a valuable Appendix an extensive reply by Dworkin to several of his critics. Dworkin's most recent book—which expands his theory—is *Law's Empire* (Cambridge: Harvard University Press, 1986).

47. I am not at all sure that Dworkin himself would agree with the claim that his theory contains anything even remotely like a pedigree test—or even a formal

test as characterized in note 22. Many of his critics have read him as offering such a test (though a much weaker one than that offered by Hart), and Dworkin insists that they have interpreted him incorrectly. Let the following count as a summary of the kind of test Dworkin often seems to offer: the legal validity of a principle will sometimes not depend solely upon the content of that principle but will also require a *location* of that principle in an external context—typically a legal tradition. It is in this very weak sense that I suggest that Dworkin has something like a formal or pedigree test. The legal status of a principle will be formal in the sense that it will not depend solely on its content but will also depend on a certain kind of institutional support—i.e., the degree to which it is entrenched in authoritative legal doctrines (the degree of its weight being a function of its degree of entrenchment). The term "entrenchment" is drawn from Rolf Sartorious; see note 57. Since entrenchment will typically involve tradition or history, something like pedigree also seems involved. For an argument that Dworkin's essential insights are more compatible with positivism than he realizes, see Coleman, *supra* note 22.

48. See Ronald Dworkin, "'Natural' Law Revisited," *University of Florida Law Review* 34 (1982):165.

49. Hart, *CL*, 127. The existence of rules with "open-textured" concepts provides only one argument for judicial discretion. Another argument is provided by the fact that any body of rules is *finite*—i.e., there will be *gaps* in the law. See Jules Coleman's review of *TRS* in *California Law Review* 66 (1978):885.

50. 115 N.Y. 506, 22 N.E. 188 (1889).

51. 32 N.J. 358, 161 A. 2d 69 (1960).

52. The point here is a logical one, not a factual one. Of course a judge can sometimes, in fact, get away with just about anything—i.e., the judge has factual freedom. The issue of concern to Dworkin is to what degree the judge is *logically* free to decide a case in a given way—i.e., at what point will his or her decision cease to count as enforcing the *law* and thus reveal a mistaken or even incoherent conception of the judicial role—will reveal that the judge is trying to make law instead of find law, create rights instead of enforce rights? Dworkin is deeply interested in a question of political philosophy: What is the nature of the judiciary and what constitutes the *integrity* of that governmental branch? If the judicial role is merely legislative, then why have such a body at all—especially since judges are not nearly as accountable as are ordinary legislators?

No matter how much they may pretend otherwise, philosophers are not immune to the social concerns of their day, and their theories often reflect those concerns. Why, one might well ask, did Dworkin succeed in accomplishing what the legal realists never could accomplish in spite of all their efforts—namely, to focus the attention of legal philosophy on the problems of judicial decision and thus make the theory of adjudication the central issue of the discipline? At least part of the answer lies in this: During the fifties and sixties, the courts seemed to be the only hope for protecting civil rights (particularly those of racial minorities) against what was often seen as the bigotry and stupidity of legislative bodies. Part of the appeal of Dworkin, then, lies in his articulate and principled (and élitist!) championing of an institution—the judiciary—that often has as one of its functions the antimajoritarian or antidemocratic role of thwarting the will of legislatures, at least in those cases where legislatures would presume to invade fundamental rights. The considerable virtues of this approach are, of course, obvious; for we are, as a society, always in need of a reminder that we live in a constitutionally limited democracy (not a pure democracy) and that there are therefore other important values at work in our system besides "the will of the people." Sometimes the people simply may not have their

collective will enforced if such enforcement would seriously encumber fundamental rights. It is not always clear, however, that Dworkin fully realizes that his approach has serious limitations as well. A complete theory of law would surely contain a theory of legislation, and such a theory would surely be more subtle and complex than Dworkin's offhand suggestion that legislatures simply add up preferences to produce beneficial policies and that principles are the business of the courts. Dworkin rejects Hart's model of strong legislative discretion for the courts but seems to endorse it as a theory of legislation. This may be too quick. Thus Dworkin, in rightly insisting that adjudication has been treated too superficially in legal philosophy, may invite us to treat legislation too superficially. We surely must fear legislative tyranny (the "tyranny of the majority"), but we should perhaps fear judicial tyranny as well. Such a fear is socially important but it is not at all encouraged by Dworkin's sometimes uncritical admiration for the judiciary.

53. Imagine a freedom of expression case where the government attempted to stifle a certain kind of speech as a threat to national security (e.g., publishing a recipe to instruct people on how to make atomic bombs at home from simple ingredients). Different judges might give different weights to the national security claim presented by the government, but each judge would surely have to regard that claim as *relevant* to deciding the case. There could surely be no controversy here. For an actual case that is similar (though somewhat less dramatic) see *U.S.* v. *Progressive Inc.*, 486 F. Supp. 5 (W. D. Wisc, 1979).

54. Dworkin, *TRS*, 22 ff. At this point (Chapter 2) Dworkin calls any nonrule appeal, whether to fairness or social policy, an appeal to "principle." In Chapter 4 he restricts the term "principle" to those appeals that involve rights, justice, or fairness.

55. See Dworkin, *TRS*, 71 ff. Some of the more interesting criticisms of Dworkin on this and related issues have been developed by Rolf Sartorius, "Social Policy and Judicial Legislation," *American Philosophical Quarterly* 8 (1971):151, and Joseph Raz, "Legal Principles and the Limits of Law," *Yale Law Journal* 81 (1972):823. Another useful study is that presented by George Christie, "The Model of Principles," *Duke Law Journal* (1968):649.

Recall that Dworkin uses the game of baseball as an example of a practice that truly is, unlike law, governed by rules. Judges must appeal to moral principles of justice or even policy in order to decide hard cases, but the officials of baseball have only easy cases—i.e., cases where they simply apply existing rules. (Any "hardness" is not with respect to the rules but is only the observational problem of seeing if the conduct covered by the rules—e.g., a tag applied—really occurred.) These rules are like yes/no or on/off switches in that they allow no *interpretive* controversy (though plenty of observational controversy!); for, once the rule is completely specified, it is always clear what is required. That this is an overly simplistic view of a complex game such as baseball has recently been dramatized by the "pine-tar feud" case in the American League. (See Russell Baker, "Batgate: Baseball's Pine-Tar Feud Reflects Justice vs. Law Conflict," *Arizona Republic*, August 6, 1983.) The case is now quite well known: On July 24, 1983, George Brett of the Kansas City Royals (behind 4–3 with two outs and one man on base) hit a homerun off New York Yankee pitcher Rich Gossage in the top of the ninth inning that put the Royals ahead 5–4—or so Brett thought. After the homerun, Yankee manager Billy Martin protested that Brett's bat was illegal because it had pine tar spread beyond the 18 inch limit allowed by American League rules. The umpires measured the pine tar on the bat, agreed it exceeded 18 inches, disallowed Brett's homerun, declared him out, and thus gave the win to the Yankees. The Royals, of course, appealed to Lee MacPhail, President

of the American League. MacPhail, acting the role of a Supreme Court justice and talking like a proponent of natural law, upheld the appeal, gave the homerun back to Brett, and ordered the game to be continued with the score now 5–4 in favor of the Royals. He reasoned that the point and integrity of baseball required that the rules be interpreted in terms of their overall rational justification. The pine-tar rule, he asserted, exists to keep balls from getting dirty, not because it is believed that the use of the substance gives the hitter an unfair advantage in propelling the ball. Only if this latter were the case would it be proper to apply a rule to disallow a hit. Given the principle behind the pine-tar rule, the only proper sanction for its violation would be the removal of the bat from play until it is cleaned. It is perhaps unclear if this case shows that the rule/principle contrast is not as obvious as Dworkin thinks or if it simply shows (as I am inclined to believe) that baseball is a more principled and lawlike activity than Dworkin realizes. At any rate, it raises some interesting problems that would bear further reflection by fans of either baseball or law. (Dworkin's illuminating discussion of chess in Chapter 4 of *TRS*—pp. 102 ff.—shows that he is actually much more aware of the interpretive complexity of games than his remarks in Chapter 2 lead one to suspect.)

56. Recall again (*supra* note 52) that Dworkin is deeply concerned with the question of the integrity of the judiciary. Do we, as potential litigants, really want to go before a judge simply to present him with the exciting opportunity of a lifetime to use our case to pursue his conception of the good? Don't we rather want our rights enforced? (It is possible, of course, that the truth lies in some combination of Hart and Dworkin here. It may not always be, as Hart would maintain, that judges are either applying rules or legislating. Dworkin may be right in saying that sometimes—perhaps a great deal of the time—they are applying principles. But perhaps not all of the time—i.e., perhaps there really is some legislating that is necessary and proper.)

57. I think that Dworkin wants his model to hold for all legal systems, not just Anglo-American law. Take even a rigid system of statutory rules. How are judges to apply these, asks Dworkin, if not in accord with the moral *principle* that like cases should be treated like? There are obvious similarities with Fuller here.

58. Dworkin, *TRS*, 62.

59. Ibid., 81 ff.

60. *Korematsu* v. *U.S.*, 323 U.S. 214 (1944).

61. The recognition of a right does not mean that it is never justified for the state to act contrary to that right—only that the state must have a better reason than mere net gain in general welfare. In the *Korematsu* case (*supra* note 60), the Court held that the government had the burden of showing that it was pursuing a "compelling" (and not merely a desirable) interest and that it was pursuing that interest in the "least restrictive way" before it could justify encumbering the rights of the Japanese Americans by internment. The Court (unfortunately, in my judgment) held that the government had satisfied this burden of proof. These matters will be discussed in more detail in the next chapter where an analysis of such concepts as "compelling state interest" and "fundamental right" will be offered.

62. See H. L. A. Hart, "Are There Any Natural Rights?" *Philosophical Review* 64 (1955). The relationship between rights and policy (and Dworkin's view about that relationship) is actually more complex than this brief discussion suggests. Some rights, for example, are created by the policy decisions of legislatures. Persons of a certain age and retirement status, for example, have a right to Social Security payments because this governmental program was established for policy reasons. These matters will be discussed in considerably more detail in Chapter 2. For present purposes,

however, this observation will do: According to Dworkin, courts may consider policy to settle on rights (e.g., how much of a threat to national security must be involved before aliens may be interned?) but *not* to create rights.

63. In Chapter 4 of *TRS* ("Hard Cases"), Dworkin imagines an ideal judge and names him Hercules. Hercules must construct a *theory* of the body of law in order to decide hard cases. Consider an analogy (often used by Dworkin) with the task of a literary critic, and take this as a sample question that one might ask of such a critic: Did David Copperfield (in Dicken's novel) have a homosexual affair? Some (the positivists of literature) would simply say that there is no right answer to this question because the written text (the novel's body of "rules") is silent on the point. But surely, Dworkin would say, the book as a whole might be rendered more or less coherent depending on the answer we give to the question. Thus, we need a *theory* of the book—a view that renders the whole work most coherent. This coherence argument will determine which answer to our question is the right answer. So, too, with the law. According to Dworkin, there are right answers in all legal cases and these answers enforce preexisting rights. The positivist denies this because the positivist argues that it makes no sense to say that preexisting rights are being enforced if there is no way of telling and, in the absence of rules from which answers can be deduced (the defining feature of a hard case), there is no way of telling. But there is a way of telling, claims Dworkin. We are not limited to deduction but also have coherence arguments at our disposal when deduction breaks down. A hard case is one where a right is not derivable from rules, but there still is a right; it just has to come from theory-based coherence arguments. (There is a problem with this, of course: A coherence argument can normally do a much more convincing job of showing that some answers are clearly wrong than that one answer is uniquely right. It seems at least possible that more than one theory of the body of law or a work of literature could produce the same level of coherence.) For more on the analogies between legal reasoning and literary criticism, see Ronald Dworkin, "Law as Interpretation," *Critical Inquiry* 9 (September 1982):179–200.

64. Dworkin, *TRS*, 40. This chapter is a reprint of Dworkin's 1967 essay, "The Model of Rules." The more the "later" Dworkin moves from this test, the more serious do his departures from legal positivism seem.

65. Ibid., 160, emphasis added.

66. Ibid., 79, emphasis added.

67. Ibid., 66–67, emphasis added.

68. *Supra* note 48, p. 165.

69. Rawls's theory of "reflective equilibrium" is presented by John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), chap. 1.

70. Dworkin, *TRS*, 60.

71. Alasdair MacIntyre, *After Virtue* (Notre Dame: University of Notre Dame Press, 1981), 235. Some writers believe that both Rawls and Dworkin have adopted more relativistic views in their most recent writings. See Thomas C. Grey, "Advice for 'Judge and Company,'" *New York Review of Books*, March 12, 1987 (a review of *Law's Empire*).

72. As indicated earlier (*supra* note 57) I think Dworkin has broader visions than this. His case discussion is limited neither to American cases nor to constitutional cases. (See, for example, his discussion of the English case *Spartan Steel and Alloys Ltd.* v. *Martin and Co.*, 1973, 1 Q.B. 27, at 83 ff. of *TRS*. Also recall that *Riggs* and *Henningsen* are not constitutional cases.) Simply a good moral theory of U.S. constitutional law, however, would be no mean achievement.

73. Dworkin, of course, seeks to break down the normative jurisprudence/analytical jurisprudence dichotomy.

74. Merrilee Salmon, Roy Spece, Michael White, and A. D. Woozley were kind enough to comment on an earlier draft of this and the previous sections. Their recommendations, though not always followed, were always valued and appreciated.

75. See Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1986). Unger attacks what he calls the "formalism" and "objectivism" of traditional legal and moral theory—his language for what I am calling "neutral principles."

76. Value skepticism is also discussed in the final section of Chapter 2.

77. Marxists tend to hold the generally Nietzschean view that moral values are simply epiphenomena of the underlying class struggle. They suggest, however, that the ruling class gets to control, not by forcing the underclass to adopt different and servile values but by getting the masses to internalize the very values of the ruling class—e.g., the sanctity of private property rights.

78. The supposed contradictions in liberal thought and liberal culture are stressed by Mark Kelman in *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987). This is one of the best introductions to CLS theory.

79. Not all advocates of feminist jurisprudence would agree that it is to be viewed simply as a branch of CLS. For an exploration of this issue—and an excellent introduction to the varieties of feminist jurisprudence—see Robin West, "Jurisprudence and Gender," *The University of Chicago Law Review*, Vol. 55, No. 1 (Winter 1988). Some feminists (often called "liberal feminists") believe that feminist concerns can be articulated within the general framework of traditional liberal rights theory. Other feminists (often called "radical feminists") believe that the basic rights doctrines of liberalism must be rejected and replaced with something else—e.g., radical skepticism or relativism or a feminized Marxism. Some of the most radical feminists argue that patterns of philosophical argument are themselves sexist and thus seek to attack even the traditional ideas of rationality and science. West explores much of this issue.

80. The following discussion of rape law is largely drawn from Susan Estrich's influential book *Real Rape* (Cambridge: Harvard University Press, 1987).

81. The idea that men essentially relate through conflict and contract whereas women typically relate through values of nurturing, care, intimacy, and conciliation is found in Carol Gilligan's influential book, *In a Different Voice* (Cambridge: Harvard University Press, 1982). Feminists regard this book as important but controversial. Gilligan's model of female psychology may assist women in reforming rape law, but it may harm them in other areas. For example, the idea that women do not handle conflict and confrontation well sounds very like the argument that senior male partners often give to justify their (sexist?) belief that women do not make good litigators. For an argument that traditional models of moral argument (e.g., formalized use of social contract theory) are essentially male biased (thus biasing supposedly neutral moral theory in favor of men), see Annette Baier's "What Do Women Want in a Moral Theory," *Nous* 19 (March 1985).

82. Radical feminists and CLS advocates would, of course, suggest that this response does not cut deeply enough—that the very liberal concepts of fairness, justice, and rights are themselves products of inegalitarian and sexist models of morality. Liberals claim, for example, that their principles of justice reflect equally the concerns of all rational people. But some feminists have argued that ideas of justice and rights tend to be formal and contractual and thus reflect the ways in which men typically relate to each other. If women tend to relate through care and intimacy, however, then they might not conceptualize morality in this way and would thus perhaps adopt different fundamental principles for social organization—principles drawn, say, from family or intimate relationship models. Hence the contradiction in

liberal theory: the claim to value all perspectives equally while adopting theories and doctrines that tacitly exclude female or minority perspectives. For more on this, see the articles by West and Baier, *supra* notes 79 and 81.

83. I am grateful to Fernando Tesón for his comments on an earlier draft of this section.

Suggestions for Further Reading

Cohen, Marshall, ed. *Ronald Dworkin and Contemporary Jurisprudence.* Totowa, N.J.: Rowman and Allanheld, 1984.

Contains critical essays by Rolf Sartorious, Jules Coleman, Joseph Raz, and others on Dworkin's work. John Mackie's "The Third Theory of Law" is a particularly provocative criticism. Includes Dworkin's reply to these critics.

Dworkin, Ronald. *Taking Rights Seriously.* Cambridge: Harvard University Press, 1978.

Contains Dworkin's first systematic defense of his attack on legal positivism and his defense of the theses that there is a right answer to every legal dispute and that such an answer is in part determined by a moral theory of rights assignment. The focus of the book is on the problem of judicial decision. The paperback edition is preferable because it contains a reply to critics.

———. *Law's Empire.* Cambridge: Harvard University Press, 1986.

A further clarification and development of Dworkin's central thesis—now labeled the "law as integrity" thesis.

Hart, H. L. A. *The Concept of Law.* Oxford: Oxford University Press, 1961.

This book is probably the finest contribution to jurisprudence of this century. It contains an analytical discussion and criticism of various legal theories and presents a sophisticated defense of legal positivism.

Hutchinson, Allan C., ed. *Critical Legal Studies.* Totowa, N.J.: Rowman and Littlefield, 1989.

An anthology containing writings by some of the most influential CLS and feminist writers—e.g., Robert Gordón, Mark Kelman, Duncan Kennedy, Catharine MacKinnon, and Mark Tushnet.

Journal of Legal Education, Vol. 38, Nos. 1 and 2 (March/June 1988).

A special issue containing thirteen essays by various feminist writers on "Women in Legal Education—Pedagogy, Law, Theory, and Practice." A good general introduction to some of the concerns and themes of feminist jurisprudence.

2

Moral Theory and Its Application to Law

As things now stand, everything is up for grabs.
Nevertheless:
Napalming babies is bad.
Starving the poor is wicked.
Buying and selling each other is depraved.
Those who stood up to and died resisting
Hitler, Stalin, Amin, and Pol Pot—and General
Custer too—have earned salvation.
Those who acquiesced deserve to be damned.
There is in the world such a thing as evil.
[All together now:] Sez who?
God help us.

—Arthur Leff[1]

John Austin called the task of morally evaluating law "normative jurisprudence." This task, as he envisioned it, consists in understanding law as it is (positive law) and then developing a rational theory about what the law *ought* to be. If Dworkin's theory of law (as presented in Chapter 1) is correct, normative jurisprudence will also have another task—namely, theoretically illuminating the moral content found in the law itself. In this chapter we shall explore both possibilities. Following a general discussion of moral philosophy and moral theory, we shall illustrate some of the legal implications of such theory by discussing as an example the morality of an issue of considerable constitutional importance: freedom of speech and press.

As a prelude to applying moral theory to or within law, it will be useful to develop at least a brief outline of moral philosophy itself—its basic questions and its basic techniques for attempting to resolve those questions. Such a brief summary of a complex discipline will necessarily be superficial, but it will perhaps be possible to provide enough of an introduction to the